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In The

Supreme Court of the United States

October Term, 1995

LISA GRANBERRY, COSETTI JORDAN,
ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL,
on behalf of themselves and
all others similarly situated,

Petitioners,

vs.

ISLAY INVESTMENTS, A California Partnership,
MARVIN TREVILLIAN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do *Mullane v. Central Hanover Bank & Trust Co.* and its progeny require that before a state court adjudicates a defendant's individualized offset claims against absent members of a plaintiff class, reasonable and timely effort be made to provide each class member with actual notice of the specific offset claim, or, does it satisfy due process if the notice of pendency of class action contains a general statement that the defendant intends to assert offset claims against some class members if the class claim is successful?

2. Do *Mullane v. Central Hanover Bank & Trust Co.* and its progeny prohibit a state court from adjudicating offset claims against absent members of a plaintiff class based on notice by publication and/or mailing 14 years after the litigation commenced, when the party asserting those claims has failed to take reasonable steps available to it to give the persons adversely affected actual notice of the claims in a timely manner?

3. Does the highest court of a state violate the Due Process Clause of the 14th Amendment and the Guaranty Clause of Art. IV, Sec. 4 of the United States Constitution by holding that a generalized statement in a notice of class action that the defendant intends to assert unspecified offset claims against some unspecified class members can serve as a substitute for individualized, specific, and prompt notice requirements enacted by the state's legislature?

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Lisa Granberry, Cosetti Jordan, Alice Glasspool and Christopher Glasspool, on behalf of themselves and all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The opinion of the Supreme Court of California in *Granberry v. Islay Investments* is reported at 9 Cal.4th 738, 889 P.2d 970, 38 Cal.Rptr.2d 650 (1995) (App. 1). The opinion of the California Court of Appeals for the Second District, Division 6, in *Granberry v. Islay Investments* is reported at 23 Cal.Rptr.2d 420 (1993) (App. 38).

JURISDICTION

The decision of the California Supreme Court was entered on March 6, 1995. A timely request for rehearing was filed on March 21, 1995 and was denied on April 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

California Civil Code Section 1950.5 regulates the manner in which a residential landlord in California may demand, hold, and make claims against security deposits paid by the tenant in addition to what the tenant pays as legitimate rent. During the time period relevant to the proceedings in the state court, subsection (f) of California Civil Code Section 1950.5 read as follows:

> Within two weeks after the tenant has vacated the premises, the landlord shall furnish the tenant, by personal delivery or by first-class mail,

postage prepaid, a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security and shall return any remaining portion of the security to the tenant.

STATEMENT

Respondents own and/or operate a number of large scale residential apartment complexes in Santa Barbara, California. Petitioners are former tenants of respondents who represent a certified class of some 10,000 former tenants of respondents who vacated their apartment units after April, 1978.

From 1973 through 1984, Respondents, pursuant to a uniform practice employing standardized rental agreements, charged each tenant an additional fixed amount of "rent" for the first month of the month-to-month tenancy.

California Civil Code Section 1950.5 regulates the taking and refunding of security deposits by residential landlords. Under the statutory regulation, a landlord may not take money in addition to the "legitimate" rent unless the landlord treats it as a security deposit.[1]

Under the statute, money taken as security must be refunded to the tenant at the termination of the tenancy unless the landlord notifies the tenant of its specific claims against the security promptly following the termination of the tenancy.

In April, 1981, Petitioners filed a class action suit in the Superior Court of the State of California, for the County of Santa Barbara. The suit sought a declaration

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[1] *Granberry v. Islay*, 161 Cal. App.3d 382, 388, 207 Cal.Rptr. 652 (1984), hereinafter (*"Granberry I"*).

that the additional fixed amount of "rent" charged for the first month of each tenancy was a security deposit which Respondents were required to refund to each tenant, an accounting of the deposits taken, and refund of the deposits to all class members. Following a trial in 1990, the Superior Court entered a judgment in favor of Petitioners holding that the extra "rent" charge was "security" within the meaning of Civil Code Section 1950.5 and refunds were due to all class members. That determination was never appealed and is now final.

In 1986 Respondents for the first time contended in the litigation that if the extra "rent" charge was determined to be a security, they intended to pursue claims by way of cross-complaints and offsets against any tenant class member who sought to join the class and obtain a refund of the alleged security deposit. Respondents indicated the alleged claims would be for the types of occupancy claims allowed under Section 1950.5: rent defaults, cost of necessary cleaning of the apartment unit after the class member vacated, and cost of repair of alleged damage to the unit not the result of normal wear and tear.

In late 1987 the notice of pendency of class action was mailed to the forwarding addresses for class members contained in Respondents' files and was published in the local Santa Barbara newspaper. (App. 91-94) That notice contained the following statement concerning Respondents' intention to pursue offset claims:

> Defendants also contend that any refund you might be entitled to must be reduced by the amount of any unpaid rent, costs necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear, and that such sums could exceed the amount of any refund or damage you might receive.

This statement is the only attempt to directly provide actual notice to any class member that Respondents were asking the Superior Court to adjudicate occupancy claims in order to defeat the class member's right to a refund of the security deposit.

Respondents had never acknowledged to any tenant that Respondents held the extra "rent" charge as a security deposit and they had never provided to their tenants any itemization of claims they might have had against the tenant as required by subdivision (f) of California Civil Code Section 1950.5. At the same time, respondents made no attempt to collect from their tenants for minor rent defaults, cleaning the apartments on termination, or any damage to the apartment unit, unless the Respondents considered the tenant to have committed acts of vandalism.[2]

Prior to trial the Superior Court granted Petitioners' motion for summary judgment dismissing Respondents' offset claims on the ground that Respondents had never furnished the individual tenants with the personal notice of those claims required by California Civil Code § 1950.5(f). Following a jury trial the trial court entered a judgment declaring the extra "rent" charge was "security" under Civil Code Section 1950.5 and ordering a refund to each class member who came forward to make a claim.

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[2] Several years after the institution of Petitioners' class action Respondents began taking a second charge which they denominated as a "security" and treated in accordance with the statute.

Respondents appealed the grant of summary judgment dismissing their offset claims but not the determination that their charge had to be refunded. On appeal the California Supreme Court ruled that Respondent had no right to retain any of the security deposits under California Civil Code Section 1950.5. due to their failure to comply with the subdivision (f) notice requirement. Nevertheless, the California Supreme Court, with one justice dissenting, authorized the trial court to proceed with the adjudication of Respondents' offset claims without further notice to the absent class members affected. The California court dismissed as "unavailing" Petitioners' objection that the absent class members were entitled to notice of the offset claims consistent with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and its progeny.

No absent class member has ever received notice of the specific offset claim being made against him or her by Respondents, yet the California Supreme Court has ordered the trial court to proceed to litigate these offset claims without further notice to the class members. The trial court will be adjudicating the offset claims of class members who do not know that the class action is even pending. Most of these class members will never appear to defend these claims. Those who do appear will have to prepare and present a defense a decade or more after they vacated their apartment units.

Proceedings Below Pertaining To The Presentation Of The Federal Issue

The history of Respondents' various extra charges to tenants is set forth in *Granberry I*, 161 Cal.App.3d 382, 207

Cal.Rptr. 652 (1984). In April of 1981 Petitioners commenced the subject class action in the Superior Court of California for the County of Santa Barbara, seeking a declaration that the extra "rent" charged for the first 31 days was a "security" under California Civil Code Section 1950.5, along with an accounting and return of the improperly taken security money. In October, 1982, the Superior Court entered an order certifying a class of approximately 10,000 persons, defined as then current tenants and former tenants of Respondents who had vacated their apartment within three years of the filing of the action and had paid a higher amount of rent for the first month of the tenancy than for the second and subsequent months.

Immediately following the certification of the class, the Superior Court entered an order granting summary judgment to the Respondents on the ground that the charge was "rent" and not security as a matter of law. In *Granberry I*, 161 Cal. App.3d 382, 207 Cal.Rptr. 652 (1984) the California Court of Appeals reversed the summary judgment ruling and held that the issue of whether the extra charge for the first month was "legitimate rent" or a "security deposit" under the statute was a question of fact for the jury to determine.

After the remand Respondents for the first time raised the issue of occupancy claims for unpaid rent, cleaning and damage and were permitted to amend their answer to allege an affirmative defense of equitable offset against some tenants.[3]

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[3] In early 1987 Respondents were also permitted to file a cross-complaint alleging occupancy claims against some 6,200 class members as well as to amend their answer to allege, in

On December 28, 1987, notice of the pendency of the class action against the Respondents was published in the local paper and mailed to 5,438 absent tenants for whom some forwarding address was available. Of the notices mailed, 1756 were returned as undeliverable. The same class notice was published in the general circulation newspaper for the Santa Barbara area. The only reference to Respondents' offset claims in the notice was the following:

> Defendants also contend that any refund you might be entitled to must be reduced by the amount of any unpaid rent, costs necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear, and that such sums could exceed the amount of any refund or damage you might receive.

(App. 92)

This notice was published and mailed in December, 1987, some 6½ years after the commencement of the action and up to 9½ years after the earliest class members had left their tenancies.

After the notice of class action, but before trial, the trial court granted Petitioners' motion for summary judgment against Respondents' offset claims on the ground

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general terms, that Respondents had individual offset claims against the class members which, in the aggregate, exceeded the amount of security deposits which Petitioners sought to recover. Respondents sought to serve the cross-complaint by delivery to Petitioners' counsel, which service was quashed by the Superior Court. Respondents made no further attempt to serve the cross-complaints on any individual class member, and the cross-complaints were dismissed pursuant to California Code of Civil Procedure § 583.250 requiring mandatory dismissal of any complaint or cross-complaint not served within three years of filing.

that Respondents had failed to comply with the requirements of subdivision (f) of California Civil Code Section 1950.5, and that non-compliance prevented Respondents from pursuing equitable offset claims against their former tenants.

The Superior Court then conducted a jury trial on two issues: (1) Was the extra charge a security? and if so, (2) Was it taken in bad faith? The jury found the additional amount charged as "rent" was a security under the statute; the jury further concluded that Respondents had not taken the charge in "bad faith."[4]

Following the jury verdict the trial court entered judgment which, *inter alia*, required Respondents to refund the security money, but only to those tenants who could be found and who came forward to make a claim. All security money held by Respondents for class members who could not be found would remain with the Respondents.

Both sides appealed from the judgment – Respondents did not appeal from the determination that the extra rent charge was security that they were required to refund, but only from the summary judgment denying them their offset claims. On appeal Petitioners challenged, *inter alia*, the order for class relief limiting the refund order only to those class members who could be found a decade after the litigation commenced. The decision of the California Court of Appeal in *Granberry v. Islay Investments*, 23 Cal.Rptr.2d 420 (1993) *("Granberry II")* sustained the judgment leaving all security money in the

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[4] Had the jury determined the Respondents had taken the security in "bad faith," Respondents would then have been subject to additional statutory damages of up to $200 per tenant.

hands of Respondents until and unless claimed by the absent tenants and reversed the trial court's dismissal of the offset claims for failure to give the notice required by subsection (f).

In a Petition for Rehearing, Petitioners contended that to permit Respondents to pursue equitable offsets for tort or contract claims when Respondents both had failed to comply with the requirements for timely notice provided for in California Civil Code Section 1950.5, subdivision (f), and had never given any absent class member notice of the specific claim being made against them, violated the Due Process Clause of the 14th Amendment to the U.S. Constitution. (App. 60-64)

On October 8, 1993, the Court of Appeals modified its opinion to clarify that the equitable offsets remained subject to equitable defenses and otherwise denied the petition for rehearing and reaffirmed the judgment. (App. 38)

Petitioners then sought and were granted review in the California Supreme Court on three issues, including:

> (1) That it was an abuse of discretion to permit Respondents to retain all the security money belonging to absent class members except for money belonging to tenants who could be found and who presented claims; and
>
> (3) That it was a violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution to permit Respondents to assert equitable offset claims in light of Respondents' total non-compliance with the provisions of subdivision (f) and the absence of any due process notice to class members in the litigation affording the absent class members a reasonable opportunity to defend against the deprivation of their refund right. (App. 65-67)

Petitioners' constitutional objections were repeated in their opening brief in the California Supreme Court. (App. 68-75)

The California Supreme Court issued its decision on March 6, 1995, (*Granberry v. Islay Investments*, 9 Cal.4th 738, 889 P.2d 970, 38 Cal.Rptr.2d 650 (1995) (*"Granberry III"*). The majority opinion reversed the Court of Appeals decision affirming the trial court's class action remedy without reaching the abuse-of-discretion issue, and instructed the Superior Court to follow the provisions of California Code of Civil Procedure Section 384.[5]

All the justices agreed that Respondents had failed to supply the notice to the tenants as required by subdivision (f), (App. 5-6 and 22) but sharply differed as to the statutory consequences of that failure. The majority opinion concluded that although a landlord who fails to comply with the personal notice requirements of California Civil Code Section 1950.5(f) loses his right to retain all or part of the security deposit and must return the entire deposit to the tenant, the landlord has not lost "all right" to claim damages for occupancy claims against the security because, as they construed and applied the statute,

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[5] California Code of Civil Procedure Section 384 requires the trial court to determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment. The trial court is then to order a report from the parties setting forth the amounts paid out to the class members and the amounts remaining. The trial court is then to amend the judgment "to direct the defendant to pay the sum of the unpaid residue, plus interest . . . , in any manner the court determines is consistent with the objectives and purposes of the underlying cause of action . . . "

> " . . . a good-faith failure to comply with section 1950.5, subdivision (f), does not bar a landlord from recovering damages for unpaid rent, repairs and cleaning, and we agree with the Court of Appeal to the extent it so held."

(App. 2):

and applied this rule of good faith to Respondents:

> " . . . [despite non-compliance] defendants may set off amounts allegedly due for unpaid rent, repairs, and cleaning against money due plaintiffs as a refund of their security deposits

(App. 6)

The decision held that since Respondents had raised their claims through the equitable defense of offset, the trial court must also determine whether those claims are barred by any of the generally applicable equitable defenses. (App. 16)

The majority decision disposed of Petitioner's contention that this construction and application of Section 1950.5 deprived tenants of timely notice and reasonable opportunity to defend against the landlord's occupancy claims by referring to the original notice of pendency of class action (App. 91-94) and concluded,

> In light of this notice, plaintiffs' contentions regarding estoppel and lack of notice are unavailing.

(App. 15) Under the majority decision, the Court of Appeals was ordered to remand the cause to the trial court to conduct further proceedings " . . . consistent with this opinion." (App. 21)

In her dissent, Justice Kennard asserted that the legislature had designed compliance with subdivision (f) of

the statute as the necessary prerequisite for a landlord to have access to the security deposits for his occupancy claims. Justice Kennard saw the majority opinion as ignoring and overriding the carefully balanced remedies selected by the state legislature. (App. 27 and 31-32)

In a Petition for Rehearing Petitioners urgently argued that the court was unconstitutionally construing and applying California Civil Code Section 1950.5(f) by violating the "elementary and fundamental requirements of due process" – timely notice and a reasonable opportunity to defend – in that the notice of pendency of class action given up to 9½ years after the termination of the tenancies could not be substituted for specific notice of the individual claim and its basis to each tenant personally within two weeks of the termination of the tenancy as required by the statute. (App. 76-85)

In the request for rehearing, Petitioners also argued that the decision (1) so changed the requirements for timely notice and a reasonable opportunity to defend provided by subdivision (f) that it violated the "elementary and fundamental requirements of due process", and (2) constituted an unacceptable judicial invasion of the legislative power repugnant to the Separation of Powers doctrine as contained in Art. III, Sec.3 of the California Constitution, and protected federally by the Guaranty Clause of Art. IV, sec.4. (App. 86-90)

The petition for rehearing was denied on April 20, 1995; Justice Kennard voted in favor of granting a rehearing.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO PREVENT THE CALIFORNIA COURTS FROM ADJUDICATING RESPONDENTS' OFFSET CLAIMS WITHOUT FIRST PROVIDING EACH AFFECTED CLASS MEMBER NOTICE REASONABLY CALCULATED TO APPRISE THE CLASS MEMBER OF THE SPECIFIC CLAIM BEING MADE, AND TO DETERMINE WHETHER AFTER A DELAY OF 14 YEARS FROM THE START OF LITIGATION, ANY FORM OF NOTICE CAN SATISFY THE REQUIREMENT OF *MULLANE V. CENTRAL HANOVER BANK & TRUST CO.* AND ITS PROGENY THAT THE CLASS MEMBER BE GIVEN A MEANINGFUL OPPORTUNITY TO PRESENT OBJECTIONS.

A. Unless The Writ Is Granted The Trial Court Will Proceed to Adjudicate Offset Claims And Defenses To Them Without First Affording Due Process Notice To Absent Class Members, Most Of Whom Do Not Even Know Their Rights Are Being Adjudicated.

The trial court has previously determined that Respondents owe each of the 10,000 members of Petitioners' class a refund of security in an amount ranging from $100 to $250 plus interest. This decision was never appealed by Respondents and is now final. Respondents seek to defeat this recovery by asserting that 6,200 or more of the members of the class owe Respondents money because each of these individual former tenants didn't make the last rent payment, did not clean the apartment to Respondents' satisfaction before the tenant vacated, or caused damage to the unit which Respondents seek to prove was not the result of normal wear and tear.

These 6,200 claims arise out of tenancies which were vacated anywhere from April of 1978 through 1987, i.e., from 8 to 17 years ago. Respondents admitted they never informed any individual tenant of the existence of any specific claim during or following the tenancy and the California Courts found Respondents failed to provide the statutory notice required under Civil Code Section 1950.5(f). (App. 5-6) Nor have Respondents during the course of the litigation ever given any notice to any specific class member of the claim Respondents are now asserting against that class member.

The California Supreme Court has ordered the trial court to proceed to adjudicate the claims, has found that all due process requirements were satisfied by the notice of pendency of class action, and has implicitly ("conduct further proceedings consistent with this opinion" App. 21) told the trial court not to consider any due process implications in the failure to provide notice of any specific claim to any class member during the fourteen years of litigation.[6]

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[6] Petitioners have explicitly contended below that the trial court could not adjudicate the offsets without first meeting federal due process notice requirements as set forth in *Mullane v. Central Hanover Bank & Trust Co.* and its progeny.

The California Supreme Court opinion never uses the term "due process" with respect to the notice issue, but the opinion does state that in view of certain language in the notice of pendency of class action " . . . plaintiffs' contentions regarding estoppel and lack of notice are unavailing." (App. 15)

In the discussion preceding this statement the Court in its opinion discussed "notice" not as a separate contention of plaintiffs, but as a part of the detriment suffered by the change of position in the estoppel contention.

Thus the trial court will now adjudicate the offset claims and the equitable defenses to them and must do so whether or not the absent class member comes forward to make a claim.[7] For each of the 6,200 claims where the trial

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Since this discussion is the only discussion in the decision that deals with the lack of "notice" issue, the California court held either

(1) That the statement in the notice of class action against the landlord could substitute for the landlord's non-compliance with the notice requirements of subdivision (f) and satisfied the notice requirement of federal due process; or the California court

(2) Denied Petitioners' due process "notice" contentions without any discussion or justification of them in the opinion, so that the mixing of the "notice" issue with the state estoppel issue was either inadvertent or a disingenuous attempt to enclose a federal "notice" issue in a state equity issue to avoid review by this Court.

Petitioners believe the first interpretation is a fairer reading of the decision, i.e., that the California Supreme Court has squarely rejected Petitioner's federal due process objections on federal grounds. However, if there is any doubt about the intent of the California Supreme Court to deny the federal due process claims, then this Court should grant certiorari and remand the case back to the California Supreme Court with a request that it clarify the basis for its ruling. *California v. Superior Court of California*, 449 U.S. 945, (1980)

[7] Under the decision of the California Supreme Court, the Respondent must refund whatever security deposit is due to each class member. See *Granberry III*, App. 17-19; California Code of Civil Procedure Section 384. Under California Code of Civil Procedure Section 1519.5, court ordered refunds which are not claimed by the persons to whom they are due within one year must be paid to the California State Controller, who has the permanent responsibility to locate the claimant as well as the obligation to pay the funds to the claimant in perpetuity. California Code of Civil Procedure §§ 1501.5, 1540. Thus, even though some class members may learn of the offset claims when

court finds no affirmative defense availing and Respondents' evidence sufficient, the refund due to each affected class member will be reduced if not entirely eliminated.

Based on the decision of the California Supreme Court, the determination of all offset claims can take place without any attempt at notice other than what was given in the notice of pendency of class action. However, even if the trial court were to order additional notice, the vast majority of absent class members can no longer be given actual notice through the mail, and hence could now receive only constructive notice by publication. The offset claims against these class members will be tried *in absentia*.[8] Those who do happen to receive actual notice and come forward will be forced to defend a claim which they first learned about 8 to 17 years after it allegedly arose.

B. The California Supreme Court Decision Is in Conflict with the Principles Announced by this Court in *Mullane v. Central Hanover Bank & Trust Co.* and Its Progeny.

In a line of cases beginning with *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306 (1950) and extending through *Tulsa Collection Services v. Pope*, 485 U.S. 478

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they come forward to claim their money, the California Supreme Court has instructed the trial court to adjudicate *in absentia* offset claims for those class members who do not learn of their right to recover their security deposit within any claim period and who never appear before the Court.

[8] As previously noted, the mailing of pendency of class action in 1987 reached only about a third of the class members. Eight years later the number will certainly be less.

(1988) this Court has required that actual notice be provided to persons before they may be deprived of their property through state auspices. Thus, in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983) the Court stated:

> " . . . prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' "

In *Tulsa Collection Services v. Pope, supra*, 485 U.S. at 488, the Court stated plainly that even an inchoate cause of action constituted a "property interest" which had to be afforded the due process protections under *Mullane*, and that when the process of a state court is invoked to deprive a person of such a cause of action, state action is involved.

There is no doubt that the absent class members represented by Petitioners in the California proceedings have a property interest in the security deposits held by Respondents. Moreover, the California Supreme Court has affirmed that Respondents have no right to retain those deposits any longer, except that they are subject to having the state trial court adjudicate Respondents' alleged occupancy claims. Thus the only way the class members may be deprived of their property interest in the refund of the unlawfully held security deposits is if the state court proceeds to hear Respondents' evidence on these inchoate claims and makes determinations that Respondents are entitled to retain the money due each individual class member.

This Court has also held that absent class members are entitled to notice of the pendency of the class litigation which seeks to determine their respective legal rights, and that such notice must be given in a manner consistent with the principles set forth in *Mullane*. In *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974) this Court held that Rule 23 of the Federal Rules of Civil Procedure required that the district courts were to give notice to absent class members of the pendency of the class action using

> the best notice practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort*. We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

Eisen, supra, 417 U.S. at 173 (emphasis in original).

The Court noted that the Advisory Committee had described subdivision (c)(2) as not merely discretionary, but mandatory, since it was designed to fulfill the requirements of due process set forth in *Mullane* to which the class action procedure is subject. *Eisen, supra*, 417 U.S. at 173-174.

In the California litigation, the class members have received notice consistent with *Mullane* regarding the pendency of the claim to recover their security deposits, but they have never received notice consistent with *Mullane* regarding the Respondents' intention to prove claims seeking to deprive the class members of those same deposits now that their right to the deposit has been finally established.

This Court should grant the writ to determine whether federal due process considerations require state

courts to follow the dictates of *Mullane* and its progeny, including *Eisen*, when the state court seeks to adjudicate individual claims raised by the defendant in the plaintiff class action to defeat recovery by absent class members who are neither parties to the litigation nor have received actual notice of the defendant's claims.

Petitioners submit that the notice of class action which the California Supreme Court held made Petitioners' due process objections "unavailing" fails to satisfy each of the notice requirements of *Mullane:*

1. **The class notice is not timely** since it was neither published nor mailed until up to 9½ years after the termination of the tenancies. When considered in the light of the dollar amount at issue, and the dilution of human memory by time and the dissipation of evidence, the untimeliness of the notice presumptively denies the class member a reasonable opportunity to defend.

2. **The class notice does not inform** any particular tenant of any particular claim, its basis or amount and thus fails "reasonably to convey the required information" within the terms of *Mullane* decision.

3. **The class notice does not provide a reasonable opportunity to make an appearance** since it provides no notice of when the class members should appear to present their objections to the offset claims. Although Justice Stevens, joined by Chief Justice Berger and Justice Rehnquist, dissented in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S.1, 25-26 (1978) the dissent, nevertheless, noted an instance when satisfying the two basic requirements of *Mullane* would be insufficient:

> For example, if the notice describes a threatened loss which can only follow a prescheduled hearing, it must also inform the recipient of the time and place of the hearing.

4. The class notice violates due process for all class members who received constructive notice only through publication. For all those tenants who never received a mailing of the notice of class action against Respondents, the publication manifestly fails to meet the requirements of *Mullane,* particularly when, as in *Mullane,* "the notice does not even name those whose attention it is supposed to attract . . . " (*Mullane, supra,* 339 U.S. at 315)

5. **The notice is not a reasonable choice** since it is not likely under all the circumstances to inform any given tenant of any particular claim. (See *Greene v. Lindsey,* 456 U.S. 444 (1982): posting of notice on the tenant's apartment door in a forcible entry and detainer action found wanting in Due Process.)

The petition should also be granted to resolve whether a state court may carry out the adjudication of claims based on notice by publication when the party asserting those claims has delayed taking reasonable steps available to it to give the persons adversely affected by the claims actual notice of the claims until such time as those persons can no longer be located with reasonable effort. This Court has stated that

> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 315. Petitioners submit that the conduct of Respondents in failing to give the statutory notice required by subdivision (f) of Civil Code Section 1950.5

and their 14 year (to date) delay in giving any individualized notice to the class members in the litigation demonstrates that they have not employed means such as one actually desirous of actually informing the class members would reasonably have adopted. Their delay has resulted in making the giving of actual notice no longer possible through "reasonable effort." (*Eisen, supra,* 417 U.S. at 173)

This Court should grant the writ to set forth the due process limitations on state and federal courts in permitting the adjudication of counterclaims against absent class members in circumstances where there is little or no likelihood that the absent class members will receive actual notice of the counterclaim and/or have a timely and reasonable opportunity to defend against it.

C. Although Further Proceedings Will Take Place In The State Trial Court, This Case Meets the Finality Requirements for Grant of Certiorari Under The Standards Set Forth in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975)

Even though further proceedings are to be carried out in the California courts, under the criteria set forth in *Cox Broadcasting Corp. v. Cohn,* 420 U.S.469 (1975), there is nevertheless justification for immediate review of the federal question presented by the California Supreme Court's decision.

While it is possible that the trial court, when it proceeds to adjudicate the offset claims, may determine that some or all of the offset claims are unmeritorious or subject to equitable defenses which preclude granting Respondents relief, absent class members will nevertheless be having their property rights adjudicated in a proceeding without having been afforded due process

notice as required by the decisions of this Court interpreting the Fourteenth Amendment to the United States Constitution.

Review of the federal due process notice issue by this Court is appropriate now under at least two of the four categories set forth in *Cox*. Under the third *Cox* category are cases "where the federal claim has been finally decided, with further proceedings in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case." *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 481. Were all of Respondents' claims to be decided against Respondent on state law grounds, the issues raised by this Petition would be mooted since Respondents would have no standing to appeal the failure to provide notice to the prevailing absent class members. On the other hand, were Respondents to prevail on offset claims against various absent class members who never receive notice of the determination, Petitioners may be held by the state courts to be bound by the existing state supreme court decision and prevented from further litigating the issue. Unless this Court reviews the due process question now, the issue may be precluded from further review by this Court.

The due process notice issue is also presently reviewable under the fourth category described in *Cox*, i.e., where the petitioner could yet prevail in the state court on non-federal grounds but "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and "a refusal immediately to review the state court decision might seriously erode federal policy . . . " *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 482-483.

Reversal of the California Supreme Court's rejection of any due process objection to adjudicating Respondents' occupancy claims without notice to absent class members will be preclusive of Respondents' equitable offset causes of action because it is no longer possible to give due process notice to any, or at the least, the vast majority of class members at this late date.

In addition to the obvious *stare decisis* effect of the unreviewed California Supreme Court decision, permitting the state trial court to proceed to adjudicate the substantive merits of some 6,200 claims against absent class members' property without affording the affected parties due process notice will itself constitute a serious erosion of the principles set forth in *Mullane* and *Eisen*. The class members (or their statutory successor in interest – the State Controller) will either be deprived of their property permanently through unconstitutional proceedings, or will have return of their property subject to further significant delay while the trial court conducts constitutionally meaningless hearings.

II. CALIFORNIA CIVIL CODE SECTION 1950.5 IS UNCONSTITUTIONAL AS CONSTRUED AND APPLIED BY THE CALIFORNIA SUPREME COURT: THE HOLDING THAT A GENERALIZED STATEMENT OF THE DEFENDANT'S INTENTION TO PURSUE OFFSET CLAIMS AGAINST CLASS MEMBERS IN THE NOTICE OF PENDENCY OF CLASS ACTION SATISFIES THE STATUTORY REQUIREMENT FOR PROVIDING INDIVIDUAL CLASS MEMBERS WITH TIMELY NOTICE AND A REASONABLE OPPORTUNITY TO DEFEND OFFENDS THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT, AND SO INVADES THE LEGISLATIVE POWER AS TO VIOLATE THE SEPARATION OF POWERS DOCTRINE, INCORPORATED IN ART. III, SEC. 3 OF THE CALIFORNIA CONSTITUTION, AND PROTECTED BY THE GUARANTEE CLAUSE OF ART. IV, SEC.4 AS WELL AS THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT.

The California Supreme Court holding that the notice of pendency of class action was a sufficient substitute or alternative to the personal notice to the individual tenant required by California Civil Code Section 1950.5(f) construes and applies subsection (f) so as to deprive the citizens of California of protections which comport with the notice requirements of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and replaces those subsection (f) notice protections with a notice which fundamentally fails to provide meaningful notice as defined in *Mullane*.

Petitioners submit that even if the Due Process Clause in the 14th Amendment to the United States Constitution would not, on its own, require the California courts to provide notice consistent with *Mullane* in the

absence of a state statute which offered such protections, for the California Supreme Court to strip the class members of due process protections comporting with *Mullane* which were afforded them by their state legislature constitutes an independent violation of federal due process and the Guarantee Clause protection of the separation of powers required for a republican form of state government.

Petitioners submit that the California Supreme Court has construed all legislatively enacted due process requirements out of California Civil Code Section 1950.5 in order to accommodate a large landlord's tardy assertion of occupancy claims and refusal to comply with the strict notice provision created by the legislature:[9]

1. The California court has eliminated the state legislative requirement for timely notice, since the statute provides that notice of any claim was to be furnished to the individual tenant within two weeks of the termination of the tenancy, but the California court has construed the statute so that the first notice of the claim may be given 9½ years after the termination of a tenancy.

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[9] Both the California Supreme Court and Respondents in their briefing to the California Court had emphasized that the jury found Respondents' conduct was not in "bad faith" within the meaning of the California Civil Code provision. However, in interpreting the application of federal due process requirements to the states, this Court has never made the protections due to persons about to be deprived of property through state action contingent upon whether the party whose claim the state was seeking to enforce was making that claim in good or bad faith. Constitutional due process protections apply independently of the state of mind of the party who stands to benefit from their elimination.

2. The California court has eliminated the state legislative requirement that the notice inform the tenant of the specific nature of the claim. The statute required the landlord to "furnish" the tenant with a copy of an itemized statement showing the amount and basis of any claims, but the California court has construed the statute to permit the landlord to litigate the claim without telling any individual class member what claim is being made against him.

3. The California court has eliminated the state legislative requirement that the notice provide a reasonable opportunity to appear and object. The statutory requirement for notice within two weeks, while the tenant may still be in the apartment or have an operative forwarding address, provides a reasonable opportunity for the tenant to object directly to the landlord or contend against the claims by seeking relief in the small claims court, but the California court has construed the statute to permit the landlord to first give notice years after the tenancy has ended, when it is unreasonable to make most tenants defend a claim for a few hundred dollars.

4. The California court has eliminated the state legislative requirement that the tenant receive actual notice of the claim. Subdivision (f) requires the landlord to "furnish" the notice to the tenant "by first class mail or personal delivery" at a point in time when giving actual notice will be practicable for virtually every tenant. The California court has construed the statute to hold that the landlord may wait years until the giving of actual notice through reasonable effort will no longer be practicable for most persons affected.

5. The California court has eliminated the state legislative requirement for a notice which was a reasonable

choice to actually inform the affected persons of the claims and has construed the statute to permit a notice which is not reasonably calculated to actually inform the class members.

The challenged construction and application of California Civil Code Section 1950.5 by the California Supreme Court is state action for the purpose of the review sought here. *Tulsa Professional Collection Services Inc. v. Pope*, 485 U.S. 478, 487 (1988). If anything, it is the challenged construction given the statute by the State Supreme Court that takes it out of the set of self-executing statutes.

The three great departments of power in government, set out in separate articles in the Constitution of the United States and the Constitution of the State of California, have different functions. According to Chief Justice Marshall, "[t]he difference between the departments is that the legislature makes, the executive executes and the judiciary construes the law." *Wayman v. Southward*, 10 Wheat. (25 U.S.) 1, 46 (1825).

In *Myers v. United States*, 272 U.S. 52 (1926), this Court noted that from our beginnings keeping the operation and function of these departments separate from each other – the Separation of Powers principle – is possibly the single most important principle or doctrine in our constitutional jurisprudence, and quoted Madison's comments from The Annals of Congress, to the following effect:

> If there is a principle in our constitution, indeed in any free constitution more sacred than another, it is that which separates the legislative, executive and judicial powers.

Myers v. United States, supra, 272 U.S. at 116.

For over two centuries this Court has tended the beacon of this cardinal principle of our form of republican government; to the extent of stating, in 1992, that an "invasion" of the territory of one department by another could not be cured of constitutional impropriety by the consent of the department invaded, (*New York v. United States*, 505 U.S.144, 120 L.Ed.2d 120, 112 S.Ct. 2404 at 2431 (1992)). (And see *Plaut v. Spendthrift Farms*, __ U.S. ___ 131 L.Ed.2d 328, 115 S.Ct. 1447 (1995) holding that Congress lacks the power to set aside a final judgment of a federal court.)

Since 1879, the Separation of Powers principle has been an express protection of the republican form of government set forth in the California Constitution, now in Article III, Sec.3.:

> The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the other powers except as permitted by this Constitution.

For the Supreme Court of California to hold that the notice of pendency of class action may substitute for the carefully delineated notice provision created by the state legislature is blatantly beyond the state court's judicial function, as it, in effect, waives the detailed requirements of a statute and replaces it with one of the court's own devise; one that holds the general may replace the particular, the late the timely, and the amorphous the detailed, in informing tenants of the amount and basis of a landlord's occupancy claims against their property (security deposits). By this holding, the California Supreme Court is essentially enacting its own private view of what constitutes timely notice and a reasonable opportunity to

defend for landlords to replace that enacted by the California Legislature.

This "invasion" of the legislative power by the California Supreme Court is offensive to the Separation of Powers principle in Art. III, Sec. 3 of the California Constitution as well as repugnant to Art. IV, sec. 4 of the United States Constitution. *Minor v. Happersett*, 88 U.S. 162 (1875); *Baker v. Carr*, 369 U.S. 186 (1962). If any principle of "republican" government is binding upon the states under the Guarantee Clause of the U.S. Constitution, than certainly it must be that *most sacred principle*: the Separation of Powers doctrine. At least one state court has so held. *Van Sickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973).

Although this Court in *Plaut v. Spendthrift Farms, Inc. supra*, restricted its decision to the narrower grounds of the Separation of Powers and chose not to rest the decision on the broader grounds of a violation of Due Process, because of the possible application to state legislation under the 14th Amendment, *(Plaut v. Spendthrift Farms*, ___ U.S. ___ 131 L.Ed.2d 328, 115 S.Ct. 1447, at 1452) Petitioners' submit that when the state has expressly placed its own version of the Separation of Powers principle into a constitution then the Due Process Clause of the Fourteenth Amendment picks up that principle and secures it to the citizens of that state, because it is then a part of law of that state secured by the Fourteenth Amendment to The United States Constitution. See: *McCullough v. Virginia*, 172 U.S.102 (1898); *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 (1816); *Ancient Egyptian Arabic Order of Nobles etc. v. Michaux*, 279 U.S. 737 (1929); *Ward v. Board of County Comm'rs*, 253 U.S. 17

(1930) and *Creswill v. Grand Lodge of Knights of Pythias*, 225 U.S. 246 (1912).[10]

CONCLUSION

For the foregoing reasons the Petitioners respectfully request the Court grant the writ of certiorari to review the decision of the California Supreme Court in this litigation.

Respectfully submitted,

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[10] This due process aspect of the separation issue was not asserted below.

Copr. (C) West 1995 No claim to orig. U.S. govt. works
38 Cal.Rptr.2d 650
(Cite as: 9 Cal.4th 738, 889 P.2d 970, 38 Cal.Rptr.2d 650)

Lisa **GRANBERRY** et al., Plaintiffs and Appellants,

v.

ISLAY INVESTMENTS et al., Defendants and Appellants.

No. S035591.

Supreme Court of California,
In Bank.

March 6, 1995.
Rehearing Denied April 20, 1995.

Hill, Schwartz & Stenson, David H. Schwartz, Michael P. Guta and Ernest L. Graves, San Francisco, for plaintiffs and appellants.

Daniel E. Lungren, Atty. Gen., Roderick E. Walston, Chief Asst. Atty. Gen., and Yeoryios C. Apallas, Deputy Atty. Gen., as amici curiae on behalf of plaintiffs and appellants.

Diane M. Matsinger, Betty L. Jeppesen, Antonio R. Romasanta, Santa Barbara, Crahan, Javelera, Ver Halen & Aull and Marcus E. Crahan, Jr., Los Angeles, for defendants and appellants.

MOSK, Justice.

An important provision of our statutory landlord-tenant law provides that within three weeks after the termination of tenancy a landlord must return the security deposit paid by a former tenant and provide a written accounting of any portion retained as compensation for unpaid rent, repairs, and cleaning. (Civ.Code,

§ 1950.5, subd. (f).)[1] We granted review to determine whether a landlord who in good faith fails to comply with the requirements of this statute may nevertheless recover damages for unpaid rent, repairs, and cleaning in a subsequent judicial proceeding. We also consider whether the trial court abused its discretion by not requiring defendants to disgorge all security deposits received from the members of the plaintiff class and to pay this money into a fund. Finally, we consider whether the court abused its discretion by limiting the award of attorney fees and costs to 25 percent of the total class recovery.

We conclude that a good faith failure to comply with section 1950.5, subdivision (f), does not bar a landlord from recovering damages for unpaid rent, repairs, and cleaning, and we agree with the Court of Appeal to the extent that it so held. We disagree with its view of the remaining issues, however, and hence reverse its judgment to permit the trial court to reconsider its choice of remedy and limitation on attorney fees.

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[1] At the time of the events in this case the statute allowed landlords only two weeks to act and the subdivision so providing was designated subdivision (e). The amendment changing the statute into its present form took effect on January 1, 1994. (Stats.1993, ch. 755, § 1.) The amendment is not material to the issues presented by this case.

All further statutory references are to the Civil Code unless otherwise specified.

FACTS

Defendants own or operate between 1200 and 1500 residential rental units in the Santa Barbara area. During the period relevant to this case, April 27, 1978, to April 27, 1981, it was defendants' practice to charge tenants an increased rental fee for the first 31 days of tenancy, but to charge a reduced fee for all subsequent months.[2] Defendants never returned this fee in whole or in part; rather, they simply retained it as part of the rental payment for the first month. Approximately 10,000 tenants paid such fees during the relevant period, and the aggregate amount of such fees was approximately $1 million.

Plaintiffs, a class of former tenants, sued for a refund of the amount by which the rent they had paid for the first 31 days of their tenancy exceeded the amount they paid in each of the following months. The court entered summary judgment in favor of defendants on the ground that the increased rent paid during the first month was in fact rent and not a security deposit within the meaning of section 1950.5, subdivision (b),[3] and therefore plaintiffs

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[2] The first month's rent exceeded the rent paid in subsequent months by approximately $100. (*Granberry* v. *Islay Investments* (1984) 161 Cal.App.3d 382, 385, fn. 4 [207 Cal.Rptr. 652].)

[3] Section 1950.5, subdivision (b) provides: "As used in this section, 'security' means any payment, fee, deposit or charge, including, but not limited to, an advance payment of rent, used or to be used for any purpose, including, but not limited to, any of the following:

"(1) The compensation of a landlord for a tenant's default in the payment of rent.

were not entitled to a refund. In an earlier appeal the Court of Appeal reversed, holding that the character of the payment was a triable issue of fact. (*Granberry* v. *Islay Investments, supra,* 161 Cal.App.3d 382.) On remand, the court granted defendants leave to amend their answer to allege they were entitled to set off amounts owed to them for unpaid rent, repair, and cleaning if a jury were to find the increased rental payment was a refundable security deposit.

Plaintiffs subsequently moved for summary judgment on the question whether defendants were entitled to a setoff in view of the fact that they had failed to comply with the requirements of section 1950.5, subdivision (f). The court granted the motion. A jury thereafter found that the excess rental payments were security deposits within the meaning of section 1950.5, subdivision (b), but that defendants had not retained them in bad faith. The court ruled that the excess fees must be refunded to the members of the class who made individual claims, but it did not require defendants to disgorge the aggregate amount of the security deposits they wrongfully retained and to pay that money into a fund. The judgment also

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"(2) The repair of damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or by a guest or licensee of the tenant.

"(3) The cleaning of the premises upon termination of the tenancy.

"(4) To remedy future defaults by the tenant in any obligation under the rental agreement to restore, replace or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied thereto by the rental agreement."

awarded costs and attorney fees to plaintiffs, but provided that such items would be recovered from the aggregate amount paid by defendants and would not exceed 25 percent of the total amount claimed by the individual members of the class.

In a second appeal the Court of Appeal held (1) the trial court erred in ruling that defendants were not entitled to a setoff, (2) the court did not abuse its discretion in granting refunds only to those class members who came forward to claim them, and (3) it was not an abuse of discretion to limit the award of attorney fees and costs to 25 percent of the total amount paid to the class. Although the Court of Appeal purported to reverse the judgment in its entirety, it in fact impliedly affirmed the judgment as to the second and third of these issues.[4]

I.

During the three-year period relevant to this litigation, plaintiffs vacated apartments rented from defendants but did not receive a written accounting of the basis for, or the amount of, the security deposits retained or the disposition of these security deposits. Nor did plaintiffs receive a refund of any portion of their security deposits. Accordingly, both the trial court and the Court of Appeal correctly concluded that defendants failed to

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[4] The Court of Appeal also held that the trial court erred in failing to award prejudgment interest to plaintiffs and that the jury instruction defining the words "bad faith" was not erroneous. Because these holdings were not addressed in the petition for review, we need not discuss them further. (Cal.Rules of Court, rule 29.3(c).)

comply with section 1950.5, subdivision (f). The issue now before us is whether, notwithstanding their good faith lack of compliance, defendants may set off amounts allegedly due for unpaid rent, repairs, and cleaning against money due plaintiffs as a refund of their security deposits. We conclude that defendants may do so.

The English chancery courts allowed setoff to be raised as a defense as early as the 17th century. (*Prudential Reinsurance Co.* v. *Superior Court* (1992) 3 Cal.4th 1118, 1124 [14 Cal.Rptr.2d 749, 842 P.2d 48]; 3 Story, Commentaries on Equity Jurisprudence (14th ed. 1918) § 1867, pp. 468-469; see also Tigar, *Automatic Extinction of Cross-Demands: Compensation from Rome to California* (1965) 53 Cal.L.Rev. 224 [tracing the history of setoff to the Roman law concept of *compensation*].) It was founded on the equitable principle that "either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference, . . . " (*Kruger* v. *Wells Fargo Bank* (1974) 11 Cal.3d 352, 362 [113 Cal.Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266].) Setoff, as it applies to this case, is now codified as section 431.70 of the Code of Civil Procedure, which provides in pertinent part: "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated for so far as they equal each other, . . . " The quoted statute, however, does not create a substantive right to raise setoff as a defense to a claim for monetary relief, but merely describes the procedures to be followed in raising

this defense. (*Kruger* v. *Wells Fargo Bank, supra,* 11 Cal.3d 352, 362 [113 Cal.Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266] *Hauger* v. *Gates* (1954) 42 Cal.2d 752, 755 [269 P.2d 609].) To determine whether setoff is available in this case, we must turn to section 1950.5.

We first consider whether to allow a landlord to raise setoff even though he has failed to comply with the requirements of section 1950.5, subdivision (f), is consistent with the legislative intent underlying that statute. (See *Prudential Reinsurance Co.* v. *Superior Court, supra,* 3 Cal.4th 1118, 1125.) "In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People* v. *Woodhead* (1987) 43 Cal.3d 1002, 1007-1008 [239 Cal.Rptr. 656, 741 P.2d 154].)

Section 1950.5, subdivision (e), allows a landlord to claim any portion of the security deposit reasonably necessary to compensate for unpaid rent, repairs, and cleaning. Section 1950.5, subdivision (f), provides in pertinent part: "Within three weeks after the tenant has vacated the premises, the landlord shall furnish the tenant . . . a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security and shall return any remaining portion of the security to the tenant." From the plain language of the

statute we conclude that a landlord (1) must return a tenant's security deposit within the specified period after the termination of the tenancy, (2) may retain all or part of the security deposit as compensation for unpaid rent, repairs, and cleaning, and (3) must provide a written accounting of any amounts retained within the specified period. If, within the specified period, the landlord has not provided the tenant with a written accounting of the portion of the security deposit he plans to retain, the right to retain all or part of the security deposit under section 1950.5, subdivision (f), has not been perfected, and he must return the entire deposit to the tenant. Nevertheless, the mere fact that the landlord has lost the right to take advantage of the summary deduct-and-retain procedure of section 1950.5, subdivision (f), does not lead to the conclusion that he has lost *all* right to claim damages for unpaid rent, repair, and cleaning, whether through setoff or otherwise. The language of section 1950.5, subdivision (f), offers no clear guidance on this issue. Accordingly, we must look to the legislative history of section 1950.5 to determine the intent of the Legislature on this point. (*People* v. *Woodhead, supra,* 43 Cal.3d 1002, 1008 [239 Cal.Rptr. 656, 741 P.2d 154].)

In 1970, the Legislature enacted section 1951, the predecessor of section 1950.5. Former section 1951, subdivision (c), provided: "The landlord may claim of such payment or deposit only such amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, or to clean such premises upon [the] termination of the tenancy, if the payment or deposit is made for any or all of those specific purposes. Any remaining portion

of such payment or deposit shall be returned to the tenant no later than two weeks after termination of his tenancy." (Stats. 1970, ch. 1317, p. 2453.) Ostensibly, the Legislature enacted section 1951, subdivision (c), to prevent the misuse of security deposits, which one contemporary commentator described as follows: "Theoretically, the security deposits are created to insure against the contingencies of unpaid rents, tenant-inflicted damages, and unclean premises at the termination of the lease. Any claim as to the retention of these funds by the landlord arises only at such time as there has been a breach of the tenant's obligation and an assessment of damage. However, the security deposit in actuality has evolved into a bonus to be kept by the landlord upon termination of the lease agreement regardless of the damages actually sustained by the landlord. Landlords will retain security deposits after the departure of a tenant secure in the knowledge that a former tenant is severely inhibited from initiating legal action. This restraint is a product of a combination of factors including problems of proof, the relatively small sum of money at issue, the time factor, and the distance now separating the tenant from his former landlord. Where the reimbursement is forthcoming, usually the payments are delayed, the application of the retained amounts unitemized, and the interim retention and use of the funds having been without cost to the landlord." (Jory, *The Residential Lease: Some Innovations for Improving the Landlord-Tenant Relationship* (1971) 3 U.C.Davis L.Rev. 31, 38-39, fns. omitted; see also Bosshardt, *The Rental Security Deposit in California* (1971) 22 Hastings L.J. 1373.) In 1972, the Legislature renumbered section 1951 as section 1950.5, but did not change the

wording of subdivision (c). Finally, in 1977, the Legislature enacted the version of section 1950.5 in effect during the events of this case (now section 1950.5, subdivision (f)).

From the foregoing history it is apparent that section 1950.5, subdivision (f), was enacted to ensure the speedy return of security deposits on the termination of tenancy and to prevent the improper retention of such deposits. However, like the Court of Appeal, we find no conclusive evidence in the legislative history of section 1950.5 regarding the specific issue we now address – namely, whether a landlord may recover damages for unpaid rent, repair, and cleaning even if he has failed in good faith to avail himself of the summary deduct-and-retain procedure permitted under section 1950.5, subdivision (f).

Defendants note that the original draft of a bill proposed in 1985 would have added language to section 1950.5 specifically denying offsets for landlords that fail to comply with section 1950.5, subdivision (f), but this language was deleted from the bill prior to enactment. They contend that this proves that the Legislature, at least in 1985, intended to allow offsets. In response, plaintiffs note that defendants urged the passage of two bills, one in 1990 and another in 1991, but that these bills also failed. Again like the Court of Appeal, we find these arguments unpersuasive. As we have often observed, "Unpassed bills, as evidences of legislative intent, have little value." (*Dyna-Med, Inc.* v. *Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1396 [241 Cal.Rptr. 67, 743 P.2d 1323]; accord, *Grupe Development Co.* v. *Superior Court* (1993) 4 Cal.4th 911, 922-923 [16 Cal.Rptr.2d 226, 844 P.2d 545].)

Defendants also remind us that we should construe section 1950.5, subdivision (f), in a way that will give effect to section 1950.5 as a whole, leaving no part useless or deprived of meaning. (*Gay Law Students Assn.* v. *Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 478 [156 Cal.Rptr. 14, 595 P.2d 592].) They draw our attention to section 1950.5, subdivision (k), which provides in pertinent part: "The bad faith claim or retention by a landlord . . . of the security or any portion thereof, in violation of this section . . . , may subject the landlord . . . to statutory damages of up to six hundred dollars ($600), in addition to actual damages. . . . In any action under this section, the landlord . . . shall have the burden of proof as to the reasonableness of the amounts claimed. . . . "[5] According to defendants, this provision is "critical" for two reasons. First, they argue that if the Legislature had intended to bar all claims for damages for unpaid rent, repair, and cleaning other than those made in accordance with section 1950.5, subdivision (f), it would not have been necessary to allocate the burden of proof regarding reasonableness, because the matter would never be litigated. According to defendants, this provision could only have meaning in cases in which the landlord has failed to comply with section 1950.5, subdivision (f), the tenant has sued for a refund, and the landlord seeks setoff. The argument misses the mark: the second sentence of section 1950.5, subdivision (k), would also apply in cases in which the tenant contests the accounting required under

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[5] Prior to the 1993 amendments (see fn. 1, *ante*) this subdivision was designated subdivision (h), and the penalty for bad faith was $200 rather than $600.

section 1950.5, subdivision (f), and sues for a refund of all or part of the amount deducted and retained under that provision.

Second, defendants contend that because the Legislature provided a remedy only for *bad faith* retention of a security deposit, we can infer it did not intend to impose a penalty for *good faith* retention. They conclude that landlords like themselves that have retained security deposits in good faith should not be penalized by being barred from raising setoff. This argument is persuasive. "[I]t is well settled that ' "Courts will not impose penalties for noncompliance with statutory provisions in addition to those that are provided expressly or by necessary implication.' " [Citations.]" (*People* ex rel. *Van de Kamp* v. *American Art Enterprises, Inc.* (1983) 33 Cal.3d 328, 334 [188 Cal.Rptr. 740, 656 P.2d 1170].) Because the Legislature has not expressly stated that landlords that fail to comply with section 1950.5, subdivision (f), *in good faith* are barred from recovering for unpaid rent, repairs, and cleaning, we find that no such penalty was intended and we will not imply such a penalty.

Plaintiffs vigorously contend this result is inconsistent with principles of equity and with public policy. (See *Prudential Reinsurance Co.* v. *Superior Court, supra,* 3 Cal.4th 1118, 1139, 14 Cal.Rptr.2d 749, 842 P.2d 48 [considering principles of equity and public policy in determining whether setoff was available].) They first urge that to allow landlords to raise setoff as a defense would be inconsistent with the equitable principle that an individual should not profit from his own wrong, because landlords may use this defense to keep all or part of the security deposits they retained in violation of section

1950.5, subdivision (f). While we recognize the importance of this equitable principle (see § 3517), and while we do not doubt that this principle may bar setoff on the particular facts of many *individual* cases, it does not justify an absolute bar to the right to a setoff in *all* cases.

When enacting, interpreting, or applying a rule of law that regulates the interaction between individual citizens, the lawmaking body should consider carefully before creating absolute and invariable rules. Normally, such laws should be as flexible as the regulated interactions are varied, and they should leave the courts with some discretion to apply them justly given the facts of the case before them. (See Heriot, *A Study in the Choice of Form: Statutes of Limitations and the Doctrine of Laches*, 1992 B.Y.U.L.Rev. 917, 920 ["In promulgating any kind of law, one of the tasks a lawmaker must perform is to select the best formulation of that law – the one that delegates to the law administrator the level of discretion and authority that is just right."].) Without some degree of flexibility, harsh and improper results may occur. (See *id.* at p. 937, fn. omitted [Comparing strict rules, like statutes of limitations, to more flexible standards, like the doctrine of laches, and asserting that as lawmakers move toward more rigid rules, "there is an increasing potential for incorrect judgments – judgments that would not reflect the lawmaker's preferences had the lawmaker adjudicated the case personally on an all-things-considered basis. . . . The rigidity of rules creates errors. [P] . . . [A] rulelike statute of limitations will always be both underinclusive and overinclusive. . . . [and therefore] [i]t will never be a perfect reflection of its underlying policies."].) Such flexibility is particularly appropriate when applying

equitable doctrines, such as setoff. (See, e.g., *Holmberg* v. *Armbrecht* (1946) 327 U.S. 392, 396 [90 L.Ed. 743, 747, 66 S.Ct. 582, 162 A.L.R. 719] ["Equity eschews mechanical rules; it depends on flexibility."].)

In addition, a landlord that seeks setoff after good faith noncompliance with the procedures described in section 1950.5, subdivision (f), does not "profit from his own wrong," because he cannot set off any damages he could not have recovered if he had complied with section 1950.5, subdivision (f). Indeed the landlord suffers a great deal if he delays, because he loses the opportunity to take advantage of the summary nonjudicial procedure allowed under that statute, and must instead prove in court by a preponderance of the evidence that he is entitled to damages and that the amount claimed is reasonable. (§ 1950.5, subd. (k).) This burden of proof will become ever more difficult to sustain the longer the landlord delays, because the evidence supporting his claim may be lost with the passage of time.

Second, plaintiffs contend that to allow defendants to raise setoff would violate the equitable principle that an individual may not change his position to the detriment of another. (See § 3512.) They note defendants originally claimed (1) the excess payments were rent, (2) they had never demanded or received security deposits from plaintiffs, and (3) they, not plaintiffs, were to bear the cost of unpaid rent, repairs, and cleaning. Only after the excess payments were found to be security deposits did defendants claim they were entitled to a setoff. Plaintiffs argue this change of position worked to their detriment because they did not receive adequate notice of defendants' claims. However, the original class notice contained the

following paragraph: "Defendants contend that any refund you might be entitled to recover must be reduced by the amount of any unpaid rent, costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear, and that such sum could exceed the amount of any refund or damages you might receive." In light of this notice, plaintiffs' contentions regarding estoppel and lack of notice are unavailing.

Finally, plaintiffs contend that to allow setoff would be inappropriate in class actions such as this because of numerous practical difficulties. They stress that (1) the class is comprised of approximately 10,000 individuals, many of whom may have moved to other parts of the state or country, (2) defendants have raised between 6,200 and 8,000 claims for setoff, which must be litigated individually, (3) because the security deposits in question are between $100 and $150, a relatively small amount of money, many class members may not appear to oppose defendants' claims, and (4) if the class members do not appear, defendants will prevail by default on their claims for setoff, and may be unjustly enriched. Given these difficulties, plaintiffs ask us not only to bar defendants from raising setoff, but to reconsider our many earlier decisions holding setoff may be raised when the claims are not liquidated (see, e.g., *Erlich* v. *Superior Court* (1965) 63 Cal.2d 551, 555 [47 Cal.Rptr. 473, 407 P.2d 649]; *Hauger* v. *Gates, supra,* 42 Cal.2d 752, 755), at least in the context of class actions. We decline to do so for two reasons. First, it may well be possible on remand to shape a remedy that will avoid many of the problems plaintiffs have identified. Second, it is inappropriate to deprive defendants of

their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen. (See *City of San Jose* v. *Superior Court* (1974) 12 Cal.3d 447, 462 [115 Cal.Rptr. 797, 525 P.2d 701, 76 A.L.R.3d 1223], fn. omitted ["Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going."].)

For the reasons stated, we conclude that a landlord who has failed in good faith to take advantage of the summary nonjudicial deduct-and-retain procedure allowed under section 1950.5, subdivision (f), may recover damages for unpaid rent, repairs and cleaning (§ 1950.5, subd. (e)) in a subsequent judicial proceeding provided that he proves by a preponderance of the evidence that he has suffered such damages and that the amount claimed is reasonable (§ 1950.5, subd. (k)).[6] The trial court erred in ruling to the contrary, and that court must now hold an evidentiary hearing to determine whether defendants have sustained this burden. Because defendants have raised their claims through the equitable defense of setoff, the trial court must also determine whether defendants' claims are barred by any of the generally applicable equitable affirmative defenses, including laches, unclean hands, and estoppel.

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[6] Because the jury did not find that defendants here acted in bad faith, we do not consider and therefore express no opinion regarding the rights of landlords who have acted in bad faith.

II.

Plaintiffs requested that judgment be entered on behalf of the entire class for the aggregate amount of the security deposits retained, and suggested that any amounts not ultimately claimed by individual class members should escheat to the state. The trial court rejected the request and entered judgment in favor of only those members of the class (excluding the named plaintiffs, whose claims were dealt with separately) who might actually come forward and file individual claims. In doing so, the court issued a memorandum of intended decision stating in pertinent part: "In certain consumer class actions Fluid Recovery may be the best method of compensating the class. The propriety of Fluid Recovery in a particular case depends upon its usefulness in fulfilling the purposes of the underlying cause of action. (See *State* v. *Levi Strauss & Company* [1986] 41 Cal.3d 460 [224 Cal.Rptr. 605, 715 P.2d 564].) We do not find that the Fluid Recovery method is necessary to fulfill the purposes of this case."[7] Plaintiffs now contend that the trial court

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[7] The term "fluid recovery" refers to the application of the equitable doctrine of cy pres in the context of a modern class action. (*State of California* v. *Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472 [224 Cal.Rptr. 605, 715 P.2d 564].) "The implementation of fluid recovery involves three steps. [Citation.] First, the defendant's total damage liability is paid over to a class fund. Second, individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof. Third, any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts." (*Id.* at pp. 472-473.)

abused its discretion by denying the remedy they requested.

"The class action is a product of the court of equity – codified in section 382 of the Code of Civil Procedure. It rests on considerations of necessity and convenience, adopted to prev[illegible]t a failure of justice." (*City of San Jose* v. *Superior Court, supra,* 12 Cal.3d 447, 458.) In 1994 the Legislature amended Code of Civil Procedure section 384, providing guidelines for the courts to use in exercising their equitable discretion to shape class remedies. Subdivision (b) of this statute declares that unless the defendant is a public entity or public employee, "prior to the entry of judgment in a class action . . . the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue, plus interest on that sum at the legal rate of interest from the date of the entry of the initial judgment, in any manner the court determines is consistent with the objectives and purposes of the underlying cause of action. . . . " In subdivision (a) of Code of Civil Procedure section 384, the Legislature explains that its intent in enacting the foregoing statute was "to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians." However, the Legislature makes it clear

that nothing in the statute "shall . . . be construed to abrogate any equitable cy pres remedy which may be available in any class action with regard to all or part of the residue." (*Id.*, subd. (d).)

When the trial court chose the class remedy in this case, it had already held that defendants were not entitled to set off amounts owed for unpaid rent, repair, and cleaning. There can be little doubt that this prior ruling was among the more important factors that the trial court considered in deciding what remedy would be most equitable given the circumstances as they then existed. However, we now hold in part I of this opinion that the trial court's initial ruling was error, that defendants are not barred as a matter of law from seeking setoff, and that they are entitled to have the opportunity to prove their right to setoff at an evidentiary hearing. It follows that the equities in this case may well have changed, and the trial court must reconsider its choice of remedy in light of the result of the forthcoming evidentiary hearing on defendants' claim of setoff.

III.

The judgment provided in part that "Plaintiffs shall recover legal costs in the amount of $___ [to be hereafter determined by the court]. Plaintiffs' counsel shall recover reasonable attorneys' fees in an amount to be hereafter determined by the Court. Such court costs and attorneys' fees shall be paid out of and deducted from any aggregate amount of money paid by Islay under this judgment as the refund of rent for the first 31 days of a tenancy

(when compared with the rent for the second and subsequent months of the tenancy). Pursuant to the notice given potential class members, such court costs together with such attorneys' fees shall not exceed 25% of said aggregate amount."

Plaintiffs contend the 25 percent limitation on attorney fees was an abuse of discretion because the court failed to obtain and consider evidence regarding the number of hours class counsel devoted to the litigation, counsel's normal hourly rates, counsel's experience, or the quality of the legal services provided. This contention is premature because it is impossible to determine whether attorney fees in the amount of 25 percent of the "aggregate class recovery" are adequate, given that (1) the amount of defendants' offsets, if any, have not yet been calculated, and it is therefore impossible to determine what the total class recovery will be, if anything, and (2) this case is far from over, and it is therefore impossible to determine the total number of hours class counsel will devote to it prior to completion.

We have held, and we remain convinced, that an " 'experienced trial judge is the best judge of the value of professional services rendered in his court. . . . ' " (*Serrano* v. *Priest* (1977) 20 Cal.3d 25, 49 [141 Cal.Rptr. 315, 569 P.2d 1303].) Accordingly, the trial court must reconsider the question of attorney fees after the forthcoming evidentiary hearing on defendants' claim of setoff.

The judgment of the Court of Appeal is reversed insofar as it impliedly affirms (1) that portion of the judgment of the trial court which limits recovery to nonnamed class members who have not opted out and who

file claims, and (2) that portion of the judgment which limits the amount of the award of costs and attorney fees. The Court of Appeal shall remand the cause to the trial court with directions to conduct further proceedings consistent with this opinion. In all other respects the judgment of the Court of Appeal is affirmed.

LUCAS, C.J., GEORGE, J., and WERDEGAR, J., concurred.

BAXTER, J. – I concur in the majority's judgment and in its holding that a landlord's good faith failure to comply with the requirement of Civil Code section 1950.5, subdivision (f) for an accounting and return of a former tenant's security deposit does not bar the landlord from raising setoff as a defense in an action by a former tenant for the refund. (All further section references are to the Civil Code.)

I respectfully disagree, though, with the majority's premise that section 1950.5 is ambiguous on the question of whether setoff is allowed and that we therefore must construe the statute based on its legislative history. " 'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . . . ' " (*Delaney* v. *Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934], quoting *Lungren* v. *Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) I believe section 1950.5 is not ambiguous and that we need not construe it. Section 1950.5, subdivision (k) provides the sole remedies for a landlord's retention of a security deposit: "The bad faith claim or retention by a landlord or the landlord's successors in interest of the security or any portion

thereof in violation of this section, or the bad faith demand of replacement security in violation of subdivision (i), may subject the landlord or the landlord's successors in interest to statutory damages of up to six hundred dollars ($600), in addition to actual damages. The court may award damages for bad faith whenever the facts warrant such an award, regardless of whether the injured party has specifically requested relief. In any action under this section, the landlord or the landlord's successors in interest shall have the burden of proof as to the reasonableness of the amounts claimed or the authority pursuant to this section to demand additional security deposits." Nothing in the statute states or even suggests that the landlord who has acted in good faith loses his right to assert a setoff. Because section 1950.5 provides the remedies for a landlord's wrongful retention but does not even mention the loss of a landlord's setoff, the statute necessarily does not deprive the landlord of the setoff. This is not ambiguous.

ARABIAN, J., concurred.

KENNARD, J., Dissenting. – The law requires that a landlord *"shall"* assert any claims against the security deposit of a tenant within a short period (formerly two, now three weeks) after the tenancy ends and *"shall"* within that period refund to the tenant any portion of the security that the landlord did not claim. (Civil Code, § 1950.5, former subd. (e), now subd. (f), italics added.) In breach of this statutory duty, the defendant landlord here illegally withheld more than $1 million in security deposited by over 10,000 residential tenants without asserting any claim against the security. Nonetheless, in the name of "equity" the majority holds that the landlord may now,

14 to 17 years after the tenancies have ended, assert claims against the tenants' security for unpaid rent, cleaning expenses, and repair costs that the statute required the landlord to assert within 2 weeks of the end of each tenancy.

In its haste to embark on its meanderings along the byways of equity jurisprudence, the majority fails to recognize that the language and purpose of the statute preclude the result it reaches. The purpose of Civil Code section 1950.5's carefully calibrated provisions is to compel landlords to refund security due tenants promptly without the necessity of legal action by the tenants. To ensure that this occurs, the Legislature imposed the requirement that landlords make their claims against the security within the statutory period. The inescapable corollary of the landlord's mandatory duty to assert any claims within the statutory period is that after that period expires the landlord loses any further right to assert claims as setoff against the security.

The majority, however, holds that landlords who violate section 1950.5's requirement to set off and refund security within the statutory period may nonetheless later raise their claims as setoff against the security. I dissent because the majority's holding ignores the statutory language, disrupts the statutory scheme, and disserves the statute's purpose. Section 1950.5 will now become a toothless remedy.

Additionally, I would hold that the trial court abused its discretion in fashioning the class remedy. I agree with the majority, however, that the plaintiff class's objections to the attorney fee order are premature.

I

Plaintiffs Lisa Granberry et al. are a class of approximately 10,000 former tenants of defendants Islay Investments and its managing partner Marvin Trevillian (hereafter collectively the landlord). The class members were tenants of the landlord between 1978 and 1981. The landlord charged the tenants on average approximately $100 more for the first month of the tenancy than for each succeeding month of the tenancy.

Granberry filed this class action contending that the excess first month charge was a security payment within the meaning of Civil Code section 1950.5; the jury agreed. During the class period, class member tenants paid the landlord over $1 million in security in the form of excess first month charges, which the landlord never refunded or accounted for upon the termination of the tenancies.

The landlord filed a cross-complaint against the class member tenants for amounts allegedly due for unpaid rent, cleaning, and repairs. The trial court dismissed the landlord's cross-complaint because it was not properly served. The landlord also sought to assert these same claims as setoff to the security the landlord had received from the class member tenants. The trial court ruled that because the landlord had not complied with Civil Code section 1950.5, former subdivision (e)'s requirement of accounting for and refunding security within two weeks of the end of the tenancy, the landlord was not entitled to set off any claims against the security.

After trial, the court entered judgment. The judgment limited the landlord's liability to the amount of security

owed to those class members who might thereafter submit a claim, rather than imposing liability for the full amount of the security withheld from the class as a whole.

Reversing the trial court, the Court of Appeal held that the landlord was entitled to set off any claims against the security owed to the class member tenants. It also held that the trial court had not abused its discretion in fashioning a class remedy limiting the landlord's liability to only the security due to those class members who might thereafter submit a claim.

II

At the times relevant to this action, Civil Code section 1950.5, former subdivision (e) provided: "The landlord may claim of the security only such amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, exclusive of ordinary wear and tear, or to clean such premises, if necessary, upon termination of the tenancy. No later than two weeks after the tenant has vacated the premises, the landlord *shall* furnish the tenant with an itemized written statement of the basis for, and the amount of, any security received and the disposition of such security and shall return any remaining portion of such security to the tenant." (Civ.Code, § 1950.5, former subd. (e), italics added.)[1] This version of section 1950.5 subsection (e), applicable during the period

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[1] Unless otherwise noted, all further statutory references are to the Civil Code.

from 1978 to 1981 relevant to this action, was enacted in 1977. (Stats. 1977, ch. 971, § 2, p. 2939.) Thereafter, the Legislature amended section 1950.5 several times, extending the landlord's compliance period from two to three weeks and redesignating as subdivision (f) the second sentence of subdivision (e) containing the setoff-and-refund provision. Accordingly, I will hereafter refer to the setoff-and-refund provision as section 1950.5(f).

Section 1950.5 limits both the nature of the claims that a landlord may assert against the security and the time within which a landlord may assert those claims. Under the statute, within two weeks after a tenancy ends the landlord must assert any claims against the security and return any unclaimed amount.

The majority holds that, despite the landlord's statutory duty to assert any claim against the security and to refund the balance within two weeks of the end of the tenancy, a landlord who retains the entire security without complying with this duty may assert claims for the first time as setoff in a subsequent action by the tenant to recover the security. In my view, this holding is inconsistent with the language and purpose of section 1950.5(f).

In analyzing statutory language, this court looks to "the object to be achieved and the evil to be prevented by the legislation." (*Harris* v. *Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159 [278 Cal.Rptr. 614, 805 P.2d 873].) As the majority acknowledges, section 1950.5(f) was designed to address the evil of landlords who fail to promptly return security due the tenant at the end of the tenancy. (Maj. opn., *ante*, at p. 746.) Recognizing the obstacles facing a former tenant seeking to recover a

security deposit from a recalcitrant landlord and the former tenant's lack of leverage over the landlord, the Legislature sought to level the playing field by in effect telling the landlord holding the security to "claim it or lose it."

The plain language of section 1950.5(f) requires a landlord within two weeks of the end of a tenancy to notify the tenant of any claims against the security and to return any portion of the security upon which the landlord has no claim. By strictly limiting the time within which a landlord can assert a claim against the security, the Legislature has necessarily provided that the landlord forfeits any right to set off claims against the security if the landlord does not do so within the statutory period.

This reading of section 1950.5(f) accords with its purpose. Section 1950.5(f) was designed to compel landlords to routinely return security due the tenant without the necessity of legal action. In the words of the majority, section 1950.5(f) "was enacted to ensure the speedy return of security deposits on the termination of tenancy and to prevent the improper retention of such deposits." (Maj. opn., *ante*, at p. 746.) This purpose is furthered by requiring landlords to assert their claims against the security promptly after the end of the tenancy or else lose the right to do so thereafter.

Although a landlord loses all recourse against the *security* by failing to assert any claims within the statutory two-week period, this does not mean that the landlord has lost all recourse against the tenant. Nothing in section 1950.5(f) suggests that, by losing the right to set off claims against the security, the landlord has also forfeited any causes of action against the tenant. A landlord

wishing to pursue those claims after allowing the statutory period to elapse may do so in an independent suit against the tenant. The landlord in this case did file a cross-complaint against the class members asserting claims for unpaid rent, cleaning costs, and repair costs; the cross-complaint was dismissed, however, when the landlord failed to properly serve it.

III

The majority hinges its conclusion that a landlord does not lose the right of setoff after the statutory period expires on the following reasoning. It first contends that to deny a continuing right of setoff to the landlord who fails to assert claims within the statutory period would impose a "penalty" on the landlord. It then contends that, because section 1950.5, subdivision (k) (hereafter section 1950.5(k)) authorizes $600 in statutory damages to be awarded against a landlord who in bad faith unlawfully retains security, the Legislature did not intend to "penalize" landlords who without bad faith unlawfully retain security by denying them the right of setoff.[2] I disagree both with the majority's characterization of the limitations period of the landlord's setoff right as a "penalty" and with its conclusion that the bad-faith-damages provision of section 1950.5(k) demonstrates an implicit intention by the Legislature not to terminate the landlord's right of setoff after the landlord has failed to assert any claims within the statutory period.

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[2] The amount of statutory damages available under section 1950.5 during the period relevant to this lawsuit was $200. (§ 1950.5, former subd. (h).)

The majority is wrong in characterizing the expiration of the section 1950.5(f) limitations period as a "penalty." We do not commonly say that someone who has forfeited a claim by failing to bring it within the statute of limitations period has suffered a penalty. Under the majority's reasoning, however, every statute of limitations would be a penalty.

Nor is a limitations period for asserting claims (such as the limitation period of section 1950.5(f)) a "penalty" in the sense in which that word was used in the case on which the majority relies, *People* ex rel. *Van de Kamp* v. *American Art Enterprises, Inc.* (1983) 33 Cal.3d 328, 334 [188 Cal.Rptr. 740, 656 P.2d 1170]. At issue there was a monetary fine, not a claims limitation period as is the case here. (See *ibid.*)

Furthermore, even if the *complete* loss of a claim resulting from the running of a limitations period could properly be characterized as a penalty, it would still be incorrect to characterize the expiration of the landlord's setoff right under section 1950.5(f) as a penalty. As explained above, the landlord whose setoff right under section 1950.5(f) lapses does not forfeit any claims against the tenant, which the landlord can still pursue in an independent action against the tenant, but only loses the right to satisfy the claims out of the security.

Even assuming that the expiration of the landlord's right to setoff could be characterized as a penalty, it is one that arises " ' "by necessary implication" ' " (*People* ex rel. *Van de Kamp* v. *American Art Enterprises, Inc., supra,* 33 Cal.3d at p. 334 [188 Cal.Rptr. 740, 656 P.2d 1170]) from the language of section 1950.5(f). As described above, the

Legislature's imposition on landlords of a mandatory duty to assert any claims against the security within two weeks of the end of the tenancy necessarily implies that if landlords fail to do so within that period, they cannot do so later. To hold otherwise would render meaningless the mandatory term "shall" that the Legislature used in section 1950.5(f).

The majority is also wrong in concluding that, because section 1950.5(k) authorizes statutory damages for landlords who retain security in bad faith, the Legislature must have intended that landlords who, without acting in bad faith, unlawfully breach their mandatory duty to account for any claims against the security and to refund any remaining security should not lose the right of setoff after the statutory period expires. Section 1950.5(k) provides: "The bad faith claim or retention by a landlord . . . of the security or any portion thereof in violation of this section, . . . may subject the landlord . . . to statutory damages of up to six hundred dollars ($600), in addition to actual damages."

The Legislature's decision to impose a special consequence – statutory damages – for retention of security that is accompanied by bad faith raises no logical inference that the Legislature intended to impose no consequence whatever for retention of security in violation of section 1950.5(f) not accompanied by bad faith. There is nothing logically inconsistent about imposing separate consequences for these different types of conduct. To the contrary, in light of the legislative purpose – to secure the prompt return of tenant funds to which the landlord has no legitimate claim – it is perfectly rational and consistent for the Legislature to have imposed, as it did, loss of

setoff as the basic consequence for all retention of security beyond the statutory period, and to have imposed statutory damages as a second and additional consequence for a particularly aggravated form of statutory violation consisting of improper retention of security accompanied by bad faith.

Nor, unlike *People* ex rel. *Van de Kamp* v. *American Art Enterprises, Inc., supra,* 33 Cal.3d 328, 334, on which the majority relies, is this a case in which, because the Legislature has provided certain penalties or consequences for a statutory violation, the issue is whether the Legislature intended those remedies to exclude other penalties or consequences. *American Art* was a nuisance action in which the trial court had imposed upon the defendants a $168,000 fine not expressly authorized by the nuisance statute. (*Id.* at p. 334.) Because the Legislature had expressly authorized injunctive relief and the sale of the offending property as remedies for a nuisance, it was unlikely that the Legislature had impliedly authorized monetary fines as an additional punishment for the same act. Here, however, in the majority's view the Legislature has provided *no* consequence for a violation of the mandatory setoff-and-refund requirement not accompanied by bad faith.

By permitting a landlord who has retained the entire security without timely asserting any claims to the tenant to nonetheless set off claims in an action by the tenant to recover the security, the majority's holding will render section 1950.5(f) a flimsy barrier against the evil it is designed to address – landlords who do not promptly account for any claims against the security and refund

whatever security is due their tenants without the necessity of legal action by the tenant. The statutory requirements that the landlord "shall" assert claims against the security within two weeks by notifying the tenant and "shall" refund any remaining portion within two weeks are meaningless, and the purpose of the statute is frustrated, if the landlord who fails to do so can nonetheless assert those claims as setoff years later in an action by the tenant to recover the security. The carefully balanced incentives of section 1950.5, designed to ensure that landlords refund security routinely and without the necessity of court action, will accordingly be defeated.

IV

The trial court's class action judgment required the landlord to refund only the security withheld from those class member tenants who might thereafter submit a claim against the landlord. The majority reverses the portion of the Court of Appeal's judgment affirming the trial court's class action remedy without reaching the issue of whether the trial court abused its discretion in fashioning that remedy. In order to provide guidance to the trial court on remand, I would reach that issue and hold that the trial court abused its discretion in ordering a class remedy that permits the landlord to retain class damages that are not claimed by individual class members.

The trial court's decision to limit the landlord's liability to only the amounts owed to those class members who may come forward and submit individual claims, rather than imposing liability for the full amount of

unlawfully withheld security owed to the class as a whole, was an abuse of discretion, even assuming that the landlord should be permitted the right of setoff. In my view, allowing a wrongdoing defendant to retain all or part of the amount for which it is liable to the plaintiff class rarely is one of the options that a court should choose in deciding how to distribute the class recovery or dispose of the residual.

Initially, the trial court failed to distinguish between the separate issues of the determination of the amount for which a defendant is liable to the plaintiff class and the method for distribution of that amount to the class. Code of Civil Procedure section 384, cited by the majority, makes clear the distinction between the amount of a defendant's liability to the class and the method of distribution of the class recovery (including the disposition of any unpaid residual). It first requires that "prior to the entry of any judgment in a class action . . . the court shall determine the *total amount* that will be payable to all class members. . . . " (Code Civ.Proc., § 384, subd. (b), italics added.) Thereafter, "the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue . . . in any manner the court determines is consistent with the objectives and purposes of the underlying cause of action. . . . " (*Ibid.*) Thus, the proper measure of the class recovery is the injury caused to the class members, not the amounts that individual class members step forward to claim.

The trial court erased the distinction between these two concepts by making the amount of the class recovery

turn on the effectiveness of the distribution method it selected. Using the trial court's formula, by definition there would never be any unpaid residuals in class actions because defendants would never have any liability for any amounts not claimed by class members. By making the landlord liable only for the security withheld from those class members who step forward to claim a refund and not for the security withheld from the class as a whole, the trial court in effect narrowed the class without notice after the trial had concluded and extinguished the causes of action of the nonclaiming class members. Instead, the trial court should have first determined the landlord's total liability to the class as a whole and then developed a method for distributing that amount to the class members to the extent feasible and for dealing with any unclaimed residual. A trial court has several sources of guidance in dealing with the unclaimed residual of a class recovery. As the majority acknowledges, the class action is a creature of equity, and it is a first principle of equity that a wrongdoer should not be permitted to profit from its wrongs. (See § 3517 ["No one can take advantage of his own wrong."]; see also Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy* (1972) 39 U.Chi.L.Rev. 448 [retention of unclaimed residue by the defendant results in "unjust enrichment of the defendant"].) Consequently, this court has previously held that the various methods of distributing the unpaid residual of a class recovery that go under the name of "fluid recovery" may be "essential to ensure that the policies of disgorgement or deterrence are realized" and should be utilized where appropriate to "fulfill[ ] the purposes of the underlying cause of action." (*State of California* v. *Levi*

Strauss & Co. (1986) 41 Cal.3d 460, 472 [224 Cal.Rptr. 605, 715 P.2d 564].)

The Legislature, in Code of Civil Procedure section 384, has expressly addressed the factors a trial court must consider in crafting a method for the disposition of the unclaimed residual of a class recovery. It has decided that "unpaid residuals in class action litigation [should be] distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians," including distribution to child advocacy programs or to the California Legal Corps. (Code Civ.Proc., § 384, subd. (a).) Rarely will it further the purposes of the underlying action or promote justice to permit a wrongdoing defendant in a class action to simply retain for its own benefit the unpaid residual of the class recovery, and nothing in Code of Civil Procedure section 384 contemplates such a result.

Accordingly, the trial court abused its discretion when it permitted the landlord to retain the unclaimed residual of the class recovery for the landlord's own benefit. The trial court in this case made no findings and gave no reasons to support its conclusion that the landlord should be permitted to retain the unpaid residual or that would explain why it was fair and just for the landlord to do so. Instead, the trial court simply made the conclusory assertion that "[w]e do not find that the Fluid Recovery method is necessary to fulfill the purpose of this case." Given that it ordinarily does not further the purposes of the underlying action or promote justice to permit a defendant to retain the unpaid residual in a class

action, the trial court's unexplained decision to the contrary was an abuse of discretion. This is especially so because the landlord here had previously attempted to evade section 1950.5's predecessor statute and to unlawfully retain security due its tenants by denominating the security a "nonrefundable cleaning fee." (See *Bauman* v. *Islay Investments* (1973) 30 Cal.App.3d 752 [106 Cal.Rptr. 889].)

CONCLUSION

The Legislature enacted section 1950.5 to protect tenants, not landlords. Section 1950.5(f) sets a clear limit on the landlord's right to set off claims against the security by requiring a landlord to assert any claims against the security within two weeks of the end of the tenancy and then refund the balance. This furthers section 1950.5's purpose of ensuring that landlords routinely refund security due their tenants without the necessity of legal action by their tenants. Repeatedly invoking its notion of equity, however, the majority ignores the language and purpose of section 1950.5(f) to hold that landlords do not lose their right of setoff after the expiration of the statutory period. I cannot agree with this attempt to rewrite section 1950.5(f) and eviscerate its purpose. Moreover, the Legislature intended that those tenants who are forced to bring a lawsuit to recover their security have a simple, swift, and certain legal remedy: section 1950.5 expressly authorizes actions brought under that section to be maintained in small claims court, limits the types of claims that can be asserted against the security, and puts on the landlord the burden of proof as to the reasonableness of any amount claimed against the security. (§ 1950.5, subds. (e),

(k), (m).) In turn, section 1950.5(f), by cutting off the landlord's right of setoff after the two-week statutory period, assures the tenant weighing whether to bring an action to recover security that he or she will not be met by a surprise claim of setoff never before raised by the landlord.

The majority's holding upsets this statutory scheme, for a tenant who brings an action to recover security now may be faced with unanticipated claims of setoff the landlord has never before asserted. The tenant's action is made not only unpredictable but more complicated. Undoubtedly, in light of the majority's creation of a landlord's right to setoff in actions to recover security, many tenants will now conclude that it is not worth the effort to bring such an action, just as they did before section 1950.5 – hardly the result the Legislature intended in enacting this consumer protection statute.

For the foregoing reasons, I would reverse the portion of the judgment of the Court of Appeal holding that the landlord may set off its claims against the illegally withheld security and the portion of the judgment holding that the trial court did not abuse its discretion in limiting the landlord's liability to only the security due those class members who hereafter submit a claim.

Copr (C) West 1995 No claim to orig. U.S. govt. works
23 Cal.Rptr.2d 420
18 Cal.App.4th 885, 23 Cal.App.4th 648
(Cite as: 23 Cal.Rptr.2d 420)

Lisa **GRANBERRY** et al., Plaintiffs and Appellants,

v.

ISLAY INVESTMENTS et al., Defendants and Appellants.

No. B057796.

Court of Appeal, Second District,
Division 6.

Sept. 9, 1993.

As Modified on Denial of
Rehearing Oct. 8, 1993.
Review Granted Nov. 24, 1993.

Hill, Schwartz, Stenson and David H. Schwartz, Michael P. Guta and Ernest L. Graves, Law Offices of David H. Schwartz, San Francisco, for plaintiffs and appellants.

Daniel E. Lungren, Atty. Gen., Roderick E. Walston, Chief Asst. Atty. Gen., Yeoryios C. Apallas, Deputy Atty. Gen. as amici curiae on behalf of plaintiffs and appellants.

Crahan, Javelera, Ver Halen & Aull and Marcus Crahan, Jr., Los Angeles, Antonio R. Romasanta, Betty L. Jeppesen, Diane M. Matsinger, Santa Barbara, for defendants and appellants.

WILLARD, Associate Justice (Assigned).*

These appeals concern security posted by approximately 10,000 tenants (plaintiffs) who rented apartments from defendants during a three-year period commencing April 27, 1978. The basic issues relate to the meaning of Civil Code[1] section 1950.5 as it read during that interval of time.

Section 1950.5 was originally enacted in 1970 as section 1951. It was amended in 1972 and again in 1977 to read as it existed during the period involved in these appeals. The relevant portions during the three-year period are set forth in footnote 2.[2]

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* Retired judge of the Superior Court sitting under assignment by the Chairperson of the Judicial Council.

[1] All further statutory references are to the Civil Code unless otherwise specified.

[2] "(a) The provisions of this section shall apply to security for a rental agreement for residential property, that is, property used as the dwelling of the tenant. "(b) As used in this section, 'security' means any payment, fee, deposit or charge, including, but not limited to, an advance payment of rent, used or to be used for any purpose, including, but not limited to, any of the following: "(1) The compensation of a landlord for a tenant's default in the payment of rent. "(2) The repair of damages to the premises caused by the tenant. "(3) The cleaning of the premises upon termination of the tenancy." . . . "(d) Any security shall be held by the landlord for the tenant who is party to such lease or agreement. The claim of a tenant to such security shall be prior to the claim of any creditor of the landlord. "(e) The landlord may claim of the security only such amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, exclusive of ordinary wear and tear, or to clean such premises, if necessary, upon termination of the tenancy. No later than two weeks

For several decades, defendants have managed a number of apartment complexes in Santa Barbara County. They have modified their rental agreement forms over the years. At one time they required tenants to post security deposits. Later, they required tenants to provide nonrefundable cleaning fees. During the period here involved, they established a rental rate for the first 31 days of occupancy. Thereafter, if the tenant continued on a month-to-month basis, a lesser rent was charged. The amount by which the first rental payment exceeded subsequent payments was not refunded in whole or in part; it was simply treated as part of the rent for the period involved.[3] The aggregate amount of such security is approximately $1 million.

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after the tenant has vacated the premises, the landlord shall furnish the tenant with an itemized written statement of the basis for, and the amount of, any security received and the disposition of such security and shall return any remaining portion of such security to the tenant. ". . . . "(h) The bad faith claim or retention by a landlord or transferee of a security or any portion thereof, in violation of this section, may subject the landlord or his transferee to damages not to exceed two hundred dollars ($200), in addition to any actual damages. In any action under this section, the landlord shall have the burden of proof as to the reasonableness of the amounts claimed. "(i) No lease or rental agreement shall contain any provision characterizing any security as 'nonrefundable.' ". . . . "Subdivision (e) of this section shall be applicable to all tenancies, leases, or rental agreements for residential property terminated on or after January 1, 1978."

[3] Further factual background is set forth in a prior appeal in this case, Granberry v. Islay Investments (1984) 161 Cal.App.3d 382, 207 Cal.Rptr. 652, and in Bauman v. Islay Investments (1973) 30 Cal.App.3d 752, 106 Cal.Rptr. 889.

On April 27, 1981, plaintiffs brought a class action against defendants seeking a refund of the amounts by which the rate for rent during the first 31 days exceeded the subsequent rate.[4] A jury found that the "excess" was in fact a security within the meaning of section 1950.5, subdivision (b). There has been no appeal from that determination. By summary adjudication, the trial judge ruled that such security deposits must be refunded to members of the plaintiff class who individually made claim therefor under a procedure to be established.

The court found that defendants were not entitled to offsets for unpaid rent, repairs or cleaning, for which a security might be required by section 1950.5, because the defendants had not complied with a requirement of subdivision (e): "No later than two weeks after the tenant has vacated the premises, the landlord shall furnish the tenant with an itemized written statement of the basis for, and the amount of, any security received and the disposition of such security and shall return any remaining portion of such security to the tenant." The judgment did not provide for requested prejudgment interest. It stated that plaintiffs' attorneys fees and costs should be determined later, should be paid out of the aggregate amount paid by defendants as refund, and should not exceed 25 percent of such aggregate amount.

Defendants have appealed from the ruling that they may not offset costs of cleaning, damages, unpaid rent, et cetera, from the security to be refunded. We reverse.

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[4] Approximately 260 members of the original class eventually "opted out" and are no longer members of the plaintiff class. Reference in this opinion, infra, does not refer to them.

Plaintiffs have appealed from the judgment claiming error with regard to four matters: (1) the jury instruction defining "bad faith," (2) the limitation of refunds to those members of the class who come forward individually to claim them, (3) failure to award prejudgment interest, and (4) limitation of attorneys fees to be awarded plaintiffs' attorneys to 25 percent of the aggregate amount defendant is ultimately required to pay. There is no error with regard to the first, second and fourth claims, but we reverse the judgment with respect to the third.

DEFENDANTS' APPEAL

During the three-year period which the litigation involves, plaintiffs vacated apartments rented from defendants. During that period, and for more than nine years thereafter, no plaintiff received a written statement of the basis for, or the amount of, security posted or of the disposition of that security. Likewise, none received a return of any portion of that security. The trial court found that defendants' default barred claims for offsets attributable to obligations for which the security was posted. Defendants contend that to deny them the right to offset, even after many years, is not mandated by the statute and would constitute an impermissible forfeiture.

In construing the meaning of the statute, two separate questions are presented. One is whether within two weeks of tenancy termination the landlord is obligated to account for and return unapplied security. We answer this in the affirmative. Where there is a failure to account, the entire deposit must be refunded, and because the amount is liquidated, prejudgment interest accrues. The

second question is whether failure of the landlord to make the required refund cancels his causes of action, if any, for which the deposit was security. In other words, does loss of the security automatically result in loss of the landlords' right to setoff for property damage, unpaid rent or other obligation secured by the deposit? We answer this in the negative.

Obligation to Refund Security

"The fundamental rule is that a court should ascertain the intent of the Legislature so as to effectuate the law's purpose, and in determining intent the court first turns to the words used. [Citation.] [P] When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citations.]" (People v. Overstreet (1986) 42 Cal.3d 891, 895, 231 Cal.Rptr. 213, 726 P.2d 1288.) This rule of statutory construction has been stated and followed many times by the Supreme Court. (People v. Woodhead (1987) 43 Cal.3d 1002, 1007-1008, 239 Cal.Rptr. 656, 741 P.2d 154; Morse v. Municipal Court (1974) 13 Cal.3d 149, 156, 118 Cal.Rptr. 14, 529 P.2d 46; Caminetti v. Pac. Mutual L. Ins. Co. (1943) 22 Cal.2d 344, 353-354, 139 P.2d 908; Solberg v. Superior Court (1977) 19 Cal.3d 182, 198, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Pursuant to that mandate, we first turn to the words of the statute in order to ascertain whether there is ambiguity or whether the statute has an unambiguous plain meaning. The statute provides: "No later than two weeks after the tenant has vacated the premises, the landlord

shall furnish the tenant with an itemized written statement of the basis for, and the amount of, any security received and the disposition of such security and shall return any remaining portion of such security to the tenant." The amount of the tenant's security deposit to be refunded is the portion "remaining" as shown by the required statement after subtracting the amount retained from the original deposit. There is no other "remainder" to which the statute could be interpreted to apply.[5]

Assuming, arguendo, that there were some ambiguity in the wording of the statute, we consider rules developed by court decision as an aid to determination of legislative intent. One is "that in attempting to ascertain the legislative intention effect should be given, whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part or provision useless or deprived of meaning." (Weber v. County of Santa Barbara (1940) 15 Cal.2d 82, 86, 98 P.2d 492, quoted and approved in Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 478, 156 Cal.Rptr. 14, 595 P.2d 592.) If any meaning is to be given to the statutory provision in question, it must be that it obligates the landlord to account for and refund the unused portion of the deposit within the two-week period specified. Otherwise, the

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[5] "Any remaining portion of the payment or deposit must be returned to the lessee no later than two weeks after termination of his tenancy." (See Comment, California Liquidated Damages (1979) 16 San Diego L.Rev. 967, 974, fn. omitted.)

requirement that the landlord "shall return any remaining portion of such security" is meaningless. (Emphasis added.) It might as well be written in "invisible ink."[6]

Another construction aid, assuming ambiguity in wording, is to look at the objectives to be achieved by the statute. This involves consideration of the evils to be remedied. (People v. Woodhead, supra, 43 Cal.3d at p. 1008, 239 Cal.Rptr. 656, 741 P.2d 154.) The situation prior to the adoption in 1970 of section 1951, the predecessor of section 1950.5, in the form governing this litigation has been described as follows: "Theoretically, the security deposits are created to insure against the contingencies of unpaid rents, tenant-inflicted damages, and unclean premises at the termination of the lease. [Fn. omitted.] Any claim as to the retention of these funds by the landlord arises only at such time as there has been a breach of the tenant's obligation and an assessment of damage. [Fn. omitted.] However, the security deposit in actuality has evolved into a bonus to be kept by the landlord upon termination of the lease agreement regardless of the damages actually sustained by the landlord. Landlords will retain security deposits after the departure of a tenant secure in the knowledge that a former tenant is severely inhibited from initiating legal action. This restraint is a product of a combination of factors including problems of proof, [fn. omitted] the relatively small sum of money at issue, the time factor, and the

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[6] (Cf. Huijers v. DeMarrais (1992) 11 Cal.App.4th 676, 678-679, 14 Cal.Rptr.2d 232.)

distance now separating the tenant from his former landlord. [Fn. omitted.] Where the reimbursement is forthcoming, usually the payments are delayed, the application of the retained amounts unitemized, and the interim retention and use of the funds having been without cost to the landlord." (Jory, The Residential Lease: Some Innovations for Improving The Landlord-Tenant Relationship (1971) 3 U.C. Davis L.Rev. 31, 38-39.)

Regardless of the accuracy of the law review description quoted, supra, it is clear that the 1970 legislation and section 1950.5 as it read during the period here involved was remedial legislation designed to furnish tenants rights they had not previously had. It did away with nonrefundable security deposits (which defendants' leases had called for prior to 1970); it set upper limits on the amount of security deposits; it required an accounting for security deposits within two weeks of tenancy termination; it exempted ordinary "wear and tear" as a basis for the retention of security deposits; and it provided for a statutory penalty in cases of bad faith retention of security deposits. This tends to show a legislative purpose of ameliorating hardships previously suffered by tenants – of leveling the playing field. We cannot reconcile this basic purpose with defendants' argument that the two-week period for accounting and refunding was a simple request to landlords, unsupported by remedies or sanctions except in cases of bad faith.

Defendants argue that to require an accounting and refund of unapplied security within two weeks of the time tenants have vacated premises would be unfair in particular circumstances. As an example, they assume a situation in which the tenant surreptitiously moves out

and the landlord has no actual notice within two weeks that the premises have been vacated. That situation is not shown to have existed here, and we state no dictum with respect to it. It is possible that in the future the statute may be interpreted to contain exceptions.

Defendants also contend that an exception to the two-week requirement should be recognized in this case because they acted in good faith, as determined by the jury. Their good faith foreclosed the assessment of a penalty not exceeding $200 per tenancy pursuant to subdivision (h) of section 1950.5. They submit that it also excuses them from making the accountings and refunds until adjudication that the money was "security." Unlike the hypothetical example of the surreptitious vacation of premises, the tenants here are not shown to have caused or contributed to the delay. They did nothing wrong. No basis exists for denying them the benefits of the statute.

When this lawsuit was filed in 1981, defendants had notice that their former tenants were seeking return of deposits without offset. Regardless of their original evaluation of the merits of that claim, in 1984 they were required to take it seriously. Our decision involving this lawsuit, issued October 30, 1984 (161 Cal.App.3d 382, 207 Cal.Rptr. 652), held that the trial court should consider and determine the close question as to whether the higher amount of the first month's rent was a security under section 1950.5 or whether it was legitimate rent. Defendants, however, did not change their position. They continued to treat it as rent until the jury found it to be "security." In this they assumed a risk. They lost and raise no appellate issue with respect to that finding.

Tenant's Obligations

Security deposits posted by tenants may be claimed by landlords only in "such amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, exclusive of ordinary wear and tear, or to clean such premises, if necessary, upon termination of the tenancy." (Civ.Code, s 1950.5, subd. (e).) If the security is lost by the landlord, does it follow that he also loses the substantive rights or causes of action for which the security was posted? For example, would the landlord's loss of a $150 security deposit deprive him of the right to collect $750 in unpaid rent or damages for negligent destruction of the premises? The statute contains no express provision for such a loss of formerly secured rights. Nor does section 1950.5 specifically relate to rights and duties of landlords and tenants except with respect to security deposits.

Nothing has been called to our attention that indicates a legislative intent to abolish the landlords' right to setoff for property damage, unpaid rent or other obligation secured by the deposit. Furthermore, "[t]he law traditionally disfavors forfeitures and statutes imposing them are to be strictly construed." (People v. United Bonding Ins. Co. (1971) 5 Cal.3d 898, 906, 98 Cal.Rptr. 57, 489 P.2d 1385.)

Each side relies in part upon legislative history to support its contention. Plaintiffs argue that defendants in 1990 and 1991 "pushed for a bill" to amend the section to make it conform to defendants' contention as to how it should be interpreted, and that neither bill was passed.

But, as said in Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1396, 241 Cal.Rptr. 67, 743 P.2d 1323: "Unpassed bills, as evidences of legislative intent, have little value. [Citations.]"

Defendants, likewise, rely on legislative history. In 1985, the Legislature failed to enact a bill that expressly would have denied the right of offset to landlords who failed to furnish the required statement and refund within the two-week time limit. This has no appreciable significance. The bill could have failed passage either because the Legislature did not like the result, or because it thought that was what the existing law provided and that the amendment was unnecessary.

At that time, the Legislature did amend the section to authorize a penalty of 2 percent per month to be charged the landlord for "bad faith" retention of security, or any portion thereof, in addition to the penalty of not to exceed $200. This is in a distinct subdivision, subdivision (k), of section 1950.5. It serves a different purpose. The penalties may be applied even though a timely accounting is rendered. The interest and damage sanctions may be applied only to that portion of the security retained in bad faith. Because the 1985 amendment is applicable to an entirely different situation than that here presented, it is not of much help in determining what the 1977 Legislature meant by the provisions it enacted. The legislative history has little significance and, in view of the explicit language of the statute, is not controlling.

We conclude that although defendants are obligated to former tenants to refund security deposits, they are not deprived of causes of action against such tenants based

either on contract or tort. Problems remain, however, with regard to statutes of limitation, prejudgment interest and offsets.

Section 431.70 of the Code of Civil Procedure furnishes a partial answer. It provides in part: "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations." Civil Code section 1950.5 does not conflict with nor bar the application of section 431.70 of the Code of Civil Procedure. Neither expressly nor impliedly does it prohibit offsets which otherwise are appropriate. The trial court shall determine what offsets should be allowed.

As discussed, infra, prejudgment interest accrues on the tenants' liquidated claims for security deposit refunds. While the issue had not been raised on appeal, it would appear that such interest would also accrue on liquidated claims of landlords (e.g., for unpaid rent), but not for unliquidated claims (e.g., for negligent damage to property).

PLAINTIFFS' CROSS-APPEAL

I. Bad Faith

Subdivision (h) of section 1950.5 provided: "The bad faith claim or retention by a landlord . . . of a security or

any portion thereof, in violation of this section, may subject the landlord . . . to damages not to exceed two hundred dollars ($200), in addition to any actual damages." Plaintiffs alleged in their pleadings and at the jury trial that defendants acted in bad faith. In instructing the jury, the trial court defined "bad faith" as follows:

" 'Bad faith' is defined as the opposite of 'good faith' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake, but by some interested or sinister motive, not simply bad judgment or negligence, but rather the conscious doing of a wrong because of dishonest purpose or moral obliquity; it contemplates a state of mind affirmatively operating with furtive design or ill will." The jury returned a finding that defendants did not act in bad faith.

Retentions of security deposits would seem to fall within one of four categories: (1) Those authorized by the statute; (2) Those not authorized by the statute, but kept with the subjective, although erroneous, belief that keeping these deposits was permitted by the statute; (3) Those not authorized by the statute, but kept through negligence; and (4) Those not authorized by the statute and kept under the belief that they were not so authorized.

Throughout the trial, defendants had claimed that the securities in question were rent; that the higher first month's rent was designed to motivate longer tenancies, and that it had nothing to do with covering the repair of damage or excessive cleaning requirements. The trial court recognized that the jury might or might not adopt

this contention, and instructed the jury that bad faith involved a state of mind as indicated in the fourth alternative, supra. That was a correct instruction.

Faith is a mental concept involving belief, "often used with the qualifiers good or bad to specify a state of mind of one trying to be honest and faithful . . . or of one trying to deceive, mislead, or defraud. . . . " (Webster's Third New Internat. Dict. (1981) p. 816.) As used in section 1950.5, subdivision (h), "bad faith," which authorized a penalty, required a finding that what was done was done with the belief that it was not authorized by statute. The statute should not be construed to penalize a person whose actions were accomplished with the subjective belief that they were permissible under the statute.

The organization of section 1950.5 supports this meaning. If every failure to furnish the required statements and to refund the unapplied portions of the security amount to bad faith, there would have been no reason to complicate the statute by introducing the bad faith concept. It would be inappropriate not to attribute some meaning to the language. (Cf. Dyna-Med, Inc. v. Fair Employment & Housing Com., supra, 43 Cal.3d at p. 1387, 241 Cal.Rptr. 67, 743 P.2d 1323.)

Reasoning by analogy may have its pitfalls, but in this case of first impression it is helpful (if not controlling). Code of Civil Procedure section 128.5, subdivision (a), provides sanctions for bad faith actions or tactics in the course of litigation or arbitration. "To interpret section 128.5 as authorizing the imposition of sanctions solely upon a consideration of whether the action was objectively frivolous would be to render the Legislature's

use of 'bad-faith' meaningless surplusage. That term is given meaning only if we assume that the Legislature intended that the court determine that an action or tactic was being pursued in subjective bad faith before imposing sanctions under this section." (Summers v. City of Cathedral City (1990) 225 Cal.App.3d 1047, 1071, 275 Cal.Rptr. 594, fn. omitted; see also Llamas v. Diaz (1990) 218 Cal.App.3d 1043, 1046-1049, 267 Cal.Rptr. 427; Javor v. Dellinger (1992) 2 Cal.App.4th 1258, 3 Cal.Rptr.2d 662.)

The trial court's instruction defining bad faith was not in error.

Plaintiffs also appear to contend that there was no substantial evidence of good faith to support the jury finding. On the contrary, the record is replete with testimony that representatives of defendants believed their rental plan was designed merely to motivate longer tenancies and was not to cover costs for which security was authorized. There was substantial evidence to support the jury's finding.

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II. The Relief

The trial court's judgment, in ordering defendants to refund security, was in favor of only those remaining members of plaintiffs' class (excluding named plaintiffs whose claims were dealt with specifically in the judgment) who came forward and filed individual claims under a procedure to be established at a later date. Plaintiffs had requested that judgment be for the total of security improperly retained and had suggested the possibility of escheat of unclaimed funds to the State of California. In denying this request, the trial judge issued

a memorandum of intended decision stating in part: "In certain consumer class actions Fluid Recovery may be the best method of compensating the class. The propriety of Fluid Recovery in a particular case depends upon its usefulness in fulfilling the purposes of the underlying cause of action. (See State v. Levi Strauss and Company [1986] 41 Cal.3d 460 [224 Cal.Rptr. 605, 715 P.2d 564].) We do not find that the Fluid Recovery method is necessary to fulfill the purpose of this case."

In that respect, this case differs from People ex rel. Smith v. Parkmerced Co. (1988) 198 Cal.App.3d 683, 244 Cal.Rptr. 22, where the district attorney sued the landlord for the return of fees charged tenants, the retention of which constituted an unlawful business practice (Bus. & Prof.Code, s 17206), and the unclaimed "refunds" were required to be paid to a tenants' organization. Unlawful business practice was defined as "unlawful, unfair or fraudulent" action. (Bus. & Prof.Code, s 17200.) The landlord was found to have acted in bad faith.

In framing a remedy the trial court limited recovery to those plaintiffs who personally made claims for the return of their deposits. It elected not to require all deposits to be placed in a fund. Had it done so, unclaimed deposits would have escheated to the State of California at the end of the year (Unclaimed Property Law, Code CivProc., s 1500 et seq.), and the basis upon which plaintiffs' attorneys' fees will be calculated would be larger than under the order made by the trial court. The trial court understood that in designing a remedy discretion was involved. The trial judge who framed the remedy had lived with this case for many years. He was

well acquainted with its history, the parties, their attorneys, and the issues involved. Our standard of review is whether he abused his discretion. We hold that he did not.

Fluid recovery is appropriate where useful in fulfilling the purpose of the underlying cause of action, as in those cases where proof of individual damages is not feasible. (State of California v. Levi Strauss & Co. (1986) 41 Cal.3d 460, 224 Cal.Rptr. 605, 715 P.2d 564; see also Bruno v. Superior Court (1981) 127 Cal.App.3d 120, 123-124, 179 Cal.Rptr. 342.) That is not the case here.

We conclude that the trial court did not abuse its discretion in fashioning the remedy it adopted.

III. Prejudgment Interest

The judgment herein expressly rejected prejudgment interest. Plaintiffs contend that they were entitled to such interest under the provisions of section 3287, subdivision (a), which provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state." Section 3281 defines damages broadly to include any monetary recovery: "Every person who suffers detriment from the

unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."

Although section 3287, subdivision (a) uses the term "damages," it has been consistently applied to require the award of prejudgment interest where the judgment is for money owed or to be refunded pursuant to a statutory obligation. (Tripp v. Swoap (1976) 17 Cal.3d 671, 681, 131 Cal.Rptr. 789, 552 P.2d 749.)

Here the amount of security to be returned to each class member was a fixed amount readily ascertainable by defendants. It was the amount by which the rent for the first 31 days exceeded the rent for subsequent months of the tenancy. The "damages" were certain and they were due two weeks after each class member vacated the rented premises.

In support of the trial court's order denying prejudgment interest, defendants rely upon Korens v. R.W. Zukin Corp. (1989) 212 Cal.App.3d 1054, 261 Cal.Rptr. 137. That decision dealt with the question of whether interest accrued on security deposits during the term of the tenancy. There was no obligation that the deposits be returned during the tenancy. Prejudgment interest was held not to apply during a period prior to the time an obligation to return the deposit came into being. The decision was based on facts not comparable with those here presented and is neither controlling nor persuasive.

It has been suggested that section 3287, subdivision (a) is inapplicable because section 1950.5, subdivision (k) was amended in 1986 to provide that a bad faith retention of security may subject the landlord to interest at a rate of

2 percent per month in addition to the penalty of not to exceed $200. Assuming, arguendo, that this provision applies to retentions that began long before the amendment became effective, does this provide the exclusive entitlement to interest? In bad faith situations, it might. But where there was no bad faith, as here, the provisions for penalty and interest at a penalizing rate are inapplicable and do not override the prejudgment interest obligation established by section 3287, subdivision (a).

IV. Costs and Attorneys' Fees

The remaining issue in these appeals relates to the allowance of costs and the award of attorneys' fees. The judgment provided: "Plaintiffs shall recover legal costs in the amount of $___ [to be hereafter determined by the Court]. Plaintiffs' counsel shall recover reasonable attorneys' fees in an amount to be hereafter determined by the Court. Such court costs and attorneys' fees shall be paid out of and deducted from any aggregate amount of money paid by Islay under this judgment as the refund of rent for the first 31 days of a tenancy (when compared with the rent for the second and subsequent months of the tenancy). Pursuant to the notice given potential class members, such court costs together with such attorneys' fees shall not exceed 25% of said aggregate amount."[7]

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[7] The class notice stated in part: "Plaintiffs' attorneys estimate that the reasonable attorneys fees and costs will total 25 percent or less of the total aggregate recovery, which fees and costs will be deducted from any recovery."

At the time the judgment was under consideration, neither side contended that an exact amount could properly be ascertained. Several issues remained open for determination on appeal. The trial court merely declared there should be a maximum consisting of 25 percent of the aggregate amount of the judgment. That aggregate amount will be different in the revised judgment. Upon remand, the trial court will be in a position to determine costs and attorneys' fees based upon the net amount to be paid by Islay. The actual figure awarded will be subject to review on appeal.

Plaintiffs also ask us to consider whether they are entitled to private attorney general fees pursuant to section 1021.5 of the Code of Civil Procedure. In the trial court, plaintiffs contended that such fees could not properly be determined until final judgment following appeal. We agree, but add that such determination should be made by the trial court. Fees may not be awarded on any basis until there has been an evidentiary hearing with respect to the basis for and the amount of the fees. The trial court should determine, among other things, which services were expended for successful claims (which are compensable) and for unsuccessful claims (which are not compensable). (Hensley v. Eckerhart (1983) 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40.) It should also determine the reasonable hourly rate (Merola v. Atlantic Richfield Company (3d Cir.1975) 515 F.2d 165, 169; In re Capital Underwriters, Inc. Securities Lit. (N.D.Cal.1981) 519 F.Supp. 92, 102-103), and the reasonable amount of hours (Bernardi v. Yeutter (N.D.Cal.1990) 754 F.Supp. 743, 744). "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and

while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' (Harrison v. Bloomfield Building Industries, Inc. (6th Cir.1970) 435 F.2d 1192, 1196. . . .)" (Serrano v. Priest (1977) 20 Cal.3d 25, 49, 141 Cal.Rptr. 315, 569 P.2d 1303.)

The judgment is reversed and remanded to the trial court for further proceedings. Each side shall bear its own costs on appeal.

GILBERT, Acting P.J., and YEGAN, J., concur.

COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

Filed September 28, 1993

ISLAY INVESTMENTS, A California Partnership, MARVIN TREVILLIAN, Appellants/ Cross-Respondents, vs. LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL, on behalf of themselves and all others similarly situated, Respondents/ Cross-Appellants,	) Santa Barbara Co.) Sup.Ct. No. 136 428)) Court Of Appeal No.) Civ B057796

CROSS-APPELLANTS' PETITION FOR REHEARING

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* * *

IV. THE COURT'S DECISION MISCONCEIVES AND MISAPPLIES C.C.P. § 431.70, RENDERING MEANINGLESS THE NOTICE PROVISION OF CIVIL CODE § 1950.5 AND VIOLATING THE CONSTITUTIONAL RIGHTS OF THE PLAINTIFFS

. . .

D. To Apply C.C.P. § 431.70 In This Case Vitiates The Protection Of Civil Code § 1950.5 Providing Tenants Timely Notice And Opportunity To Defend Against Claims Of The Landlord.

Civil Code Section 1950.5 protects a tenant's money held by a landlord as security by providing that the tenant have timely notice and opportunity to defend before being deprived of his money – security – to satisfy the claims of the landlord upon termination of the tenancy. This Court's decision provides that while a landlord, who takes a security disguised as rent and has never given notice of any claim to the tenant, may not privately deduct from the security he holds, he nevertheless may obtain such relief judicially.

In short, this result – charge a security as disguised rent, treat the rent as income, never give notice, then when it is determined that the disguised rent is a security, setoff the hidden claims against the security-as-judgment – gives a flat premium to a landlord to disguise the security and never give notice to the tenants of anything. By this decision the landlord has everything to gain and nothing to lose by violating Civil Code § 1950.5 through disguising a security and never giving notice, because what he loses on the front side by not being able to setoff

against the security – qua security – he gains on the back side by offsetting against the security-as-judgment, while all the time holding the tenant's money, and still without ever telling the tenant of his claims in any timely fashion.

In essence, it is meaningless to say a landlord may not setoff a security he holds when he does not give notice, but that he may nevertheless defeat a suit to recover that security by judicially asserting an equitable claim to setoff. This merely converts the judgment for return of the security into a new security that he may still setoff without giving notice. To paraphrase what was said in *Beckman v. Manlove, supra,* 18 Cal. 388:

This use of C.C.P. 431.70 would operate a practical repeal of the notice provision of C.C. 1950.5.

F. The Decision Of The Court Authorizing The Defendants To Setoff Their Disputed Claims Under C.C.P. 431.70 In This Case Violates The Due Process Clause Of The 14th Amendment To The United States Constitution And Sections 7 And 15 Of The California Constitution. The Set-offs Represent An Unconstitutional Prejudgment Attachment Without Due Process Notice.

The notice provision of C.C. 1950.5 saves a tenant from being deprived of property without timely notice and an opportunity to defend by requiring the landlord to state his claims and the amount while returning the balance of the security. To this extent the notice provision serves a constitutional due process function.

When no notice is supplied of the landlord's claims under this section, as in this case, the tenant is being

deprived of timely notice and opportunity to defend the purported claims of which he is ignorant. Failure to give notice of the landlord's claims under C.C. 1950.5 necessarily bars the landlord from satisfying his claims against the security. But it does more. The failure to give any notice to the tenant of the alleged claims of the landlord deprives the tenant of timely notice and an opportunity to defend the claims which the landlord has, if any, whether or not they are secured by a deposit. Absent any form of timely notice and opportunity to defend these claims of the landlord, the tenant may be deprived of property without due process of law through state action. The decision of this court authorizing setoffs under C.C.P. 431.70 of disputed claims as to which the tenant has never been given notice of any kind violates due process. The notice deficiency which precludes the landlord going to the security also bars presenting these claims as setoffs unless there has been timely notice and opportunity to defend, which, it is clear, has never been given to the tenants in this case.

The notice deficiency which bars access to the security for these claims also bars these same claims as setoffs under C.C.P. 431.70 because the tenants have never been given a timely notice and opportunity to defend them – i.e., due process. *Shelley v. Kraemer,* (1948) 344 U.S. 1; *Kruger v. Wells Fargo, supra,* 11 Cal.3d at 357-361.

The due process problem is exacerbated by the relief decreed by the trial court and affirmed by this Court: unless a tenant comes forward to make a claim for the security, defendants will have obtained the benefit of a pre-judgment attachment without notice or evidentiary hearing of defendants' claim. The trial court's order will

extinguish the tenant's right in the security without any due process notice or opportunity to be heard. *Shelley v. Kraemer,*

Equal Protection

To permit defendants to setoff disputed claims under C.C.P. § 431.70 in this case is to unequally apply the law to plaintiffs' detriment. Simply put this decision gives tenants whose landlords comply with Civil Code Section 1950.5 greater rights to recover their security than the class members here whose landlord's intentional conduct violated Civil Code Section 1950.5. Class members are entitled to judicial relief which will at least treat them on a par with tenants whose landlords have complied with the applicable law. The Court has advanced no rational basis for treating the class members in this action less favorably than tenants whose landlords obey the law.

* * *

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Filed October 19, 1993

LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL, on behalf of themselves and all others similarly situated, Petitioners/ Appellants, vs. ISLAY INVESTMENTS, A California Partnership, MARVIN TREVILLIAN, Defendants/ Respondents.	Santa Barbara Co. Sup.Ct. No. 136 428 Court Of Appeal No. 2d Civ B057796

PETITION FOR REVIEW

(From The Decision Of The Court Of Appeal,
Second Appellate District, Division Six,
Dated September 9, 1993)

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ISSUE III

* * *

D. *Code Of Civil Procedure Section 431.70 As Construed And Applied In The Court Of Appeals Decision Is Unconstitutional By Violating The Due Process And Equal Provisions Of the Fourteenth Amendment To The United States Constitution And Sections 5 and 15 Of the California Constitution.*

It has long been recognized that a provision constitutional on its face may be unconstitutional as construed and applied. *Yick Wo v. Hopkins,* (18886) [*sic*] 118 U.S. 356; and certainly such a construction and application when it occurs at the appellate level satisfies the requirement of state action. *Shelley v. Kraemer,* (1948) 344 U.S. 1, and see discussion by this Court in *Kruger v. Wells Fargo Bank,* (1974) 11 Cal.3d 352, 357-361.

It is the submission of the Petitioners herein that this Court should grant review to correct the construction and application given C.C.P. § 431.70 in the decision of the court below which authorizes the landlord to offset occupancy claims against the tenants claims for refund *even though the landlord's offset claims are barred by the statute of limitations.* This application of Section 431.70 results in a deprivation of the tenants' property without due process of law, i.e., without timely notice and an opportunity to defend – by state action.

The requirement of C.C. § 1950.5 that the landlord provide an itemization of claims within two weeks of termination of the tenancy before taking the tenant's money without a hearing may have minimally satisfied

the constitutional due process requirements. The applicable statutes of limitations on bringing actions at law also serve to provide notice and opportunity to defend within what is deemed a suitable period legally and constitutionally.

For the court below to construe and apply C.C.P. §431.70 to authorize a landlord to offset claims against a security when (1) the landlord has never given notice to the tenants of these claims since 1978, (2) they are barred from assertion against the security itself for the failure to comply with a statutory notice provision and (3) they are barred from assertion at law by the applicable statutes of limitations, is to ignore and deprive the tenants of the protections of timely notice and opportunity to defend. This is really a new lamp for old; ignore and eliminate all the existing protections of notice and fair opportunity to defend and substitute a construction and application of C.C.P. § 431.70 that ignores the requirement of such timely notice and opportunity to defend.

The construction and application of C.C.P. § 431.70 given in the decision below violates the due process provisions of the state and federal constitutions. This Court should grant review to correct what will otherwise be a taking of property from thousands of tenants without basic due process notice or opportunity for a hearing.

* * *

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Filed January 7, 1993

LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL, Respondents/ Cross-Appellants, on behalf of themselves and all others similarly situated, vs. ISLAY INVESTMENTS, A California Partnership, MARVIN TREVILLIAN, Appellants/ Cross-Respondents.	Supreme Court No. S035591 Santa Barbara Co. Sup.Ct. No. 136 428 Court Of Appeal No. Civ B057796

RESPONDENT AND CROSS-APPELLANTS' OPENING BRIEF

(From The Decision Of The Court Of Appeal, Second Appellate District, Division Six, Dated September 9, 1993, As Modified October 8, 1993)

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I.

* * *

F. The Trial Court's Judgment Giving The Landlord The Security Money Belonging To Absent And Non-Appearing Tenant Class Members Violates Due Process And Constitutes An Illegal Taking

The judgement entered by the trial court and approved by the Court of Appeal will effectively transfer title to all security unclaimed by tenants from those tenants to the landlord.[21]

Since it is now almost 10 years since defendants terminated their practice, and most tenants have long ago moved from the premises, notice of the ability to make a claim and the running of such a claim period will represent no more than constructive notice for the vast majority of class members. Most absent class members will have their rights to the security extinguished without ever receiving actual notice and without any meaningful opportunity to claim their security.

Such a court ordered procedure violates due process and constitutes an illegal taking in violation of the Fifth

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[21] When the trial court entered its order of relief giving to Defendants the security money unless it was claimed by a tenant class member, the trial court had previously stricken all of Defendants' cross-complaints and offset claims. Thus the trial court's order reflects a decision that title to all unclaimed security money should be transferred to Defendants even in the absence of any cognizable claims for offsets. As discussed in Part II, *infra*, the Court of Appeal's decision that C.C.P. § 437.10 permits the assertion of offsets otherwise extinguished by Section 1950.5 is wrong and there are no offset claims which can now be asserted.

and Fourteenth Amendments to the United States Constitution and Article, I, Sections 7 and 15 of the California Constitution. This Court has held repeatedly that a court or governmental agency cannot participate in a taking of property without first affording reasonable notice and an opportunity to be heard:

> We start with the basic proposition that in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing. (*Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, 458 [121 Cal.Rptr. 585, 535 P.2d 713].) As the United States Supreme Court noted more than a quarter century ago: "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property . . . be preceded by notice and opportunity for hearing appropriate to the nature of the case." (*Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306 [94 L.Ed. 865, 872-873, 70 S.Ct. 652].)

Kash Enterprises, Inc. v. City of Los Angeles, (1977) 19 Cal.3d 294, 307; *See also, Horn v. County of Ventura,* (1979) 24 Cal.3d 605, 612; *Randone v. Appellate Department,* (1971) 5 Cal.3d 536, 541; *North Georgia Finishing, Inc. v. Di-Chem, Inc.,*(1975) 419 U.S. 601, 605-606 [42 L.ED.2d 725, 733-736, 95 S.Ct. 729].

In *Kash Enterprises, Inc., supra,* this Court held that even if a collateral remedy were available it could not "sustain a seizure procedure which provides absolutely no hearing whatsoever, either before or after the taking." *Id.* 19 Cal.3d at 309.

In *Tulsa Collection Services v. Pope*, (1988) 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 the United States Supreme Court held invalid an Oklahoma statute which provided for the extinguishment of claims of unsecured creditors against a decedent's estate with only constructive notice by publication advising creditors of the deadline for filing a claim with the decedent's estate. The Supreme Court required that where the creditor's name was known, the Due Process Clause required that "appellant be given notice by mail or other means as certain to ensure actual notice." *Id.* 485 U.S. at 491.

Adjudicative actions which deprive a person of a significant property interest require reasonable notice and opportunity to be heard. While the standards for the application of due process principles are "flexible," where "prior notice of a potentially adverse decision is constitutionally required, that notice must, at a minimum, be reasonably calculated to afford affected persons the **realistic** opportunity to protect their interests." *Horn v. County of Ventura*, (1979) 24 Cal.3d 605, 617, (emphasis supplied).

The trial court's form of judgment fails to take into account that the notice by publication which will be the only notice almost all class members [constructively] receive, will result in the class members' being deprived of property without any actual notice or a meaningful opportunity to be heard. In the absence of some "compelling" state interest, such as narcotics enforcement or preventing distribution of contaminated food, such lack of

notice is insufficient to satisfy due process requirements.[22] The trial court's order, as affirmed by the Court of Appeal, contains absolutely no description of the reasons why the absent class members who cannot be found should be deprived of their property in favor of the wrongdoing defendants, other than the Court of Appeal's statement that:

> The trial judge who framed the remedy had lived with this case for many years. He was well acquainted with its history, the parties, their attorneys, and the issues involved.

The Court of Appeal's justification for permitting the trial court to transfer the unclaimed security to the ownership of the wrongdoing defendant is an endorsement of a discretion completely arbitrary and capricious, lacking any justification in law, and oblivious to the due process rights of absent class members. It elevates the untrammeled discretion of a trial judge over the rules of law governing the disposition of tenant security and unclaimed consumer funds which have been clearly stated by the legislature. It substitutes for the rule of law the "discretion of the trial judge" because he is "well

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[22] *See Kash Enterprises, Inc., supra,* 19 Cal.3d at 308: "The decisions have also recognized, however, that in particular circumstances important governmental interests may justify the postponement of notice and hearing until after the initial "taking" has occurred. [citations] Even when such special considerations pertain, however, the cases have stressed that an opportunity to be heard may only be postponed, not entirely eliminated."

acquainted . . . with the parties."[23] The judgment entered by the trial court effectively transferring unclaimed security to the defendants violates both substantive and procedural due process principles and must be reversed.

* * *

E. The Due Process Provisions Of The 14th Amendment To The U.S. Constitution And Article I, Sections 7 And 15 of the California Constitution Weigh Against Permitting Offsets Under C.C.P. § 431.70 In This Case

In the Petition for Review, plaintiffs asserted that the decision of the Court of Appeal permitting offsets under C.C.P. § 431.70 violated the due process clause of the state and federal constitutions by depriving tenants of their property without timely notice and opportunity to defend. In this Court plaintiffs would prefer to say that such a construction and application of C.C.P. § 431.70 is to be avoided if possible, which principle (avoidance) supports the denial of offsets under C.C.P. § 431.70 in this case.

Although plaintiffs will not remake the argument made in III-D of the Petition for Review, plaintiffs would

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[23] [The] history [of the Due Process Clause] reflects the traditional and commonsense notion that the Due Process Clause, like its forebear in the Magna Carta, . . . was " 'intended to secure the individual from the arbitrary exercise of the powers of government.' "

Daniels v. Williams, (1986) 474 U.S. 327, 331, 88 L.Ed.2d 662, 668, 106 S.Ct. 662.

restate an assertion made therein at the last paragraph of page 29 by adding a 4th point:

> For the court below to construe and apply C.C.P. 431.70 to authorize a landlord to offset claims against a security when (1) the landlord has never given notice to the tenants of these claims since 1978, (2) they are barred from assertion against the security itself for failure to comply with a statutory notice provision, and (3) the very sum sought comes out of property taken and kept in contravention of the law, is to ignore and deprive the tenants of timely notice and opportunity to defend.

Since, as previously noted, most tenant class members will never receive any actual notice of their right to obtain security or the asserted offset claim against such security, to the extent that defendants' offset claims are allowed against class members, the vast majority will result in offset judgments against the class member by default, based solely on the untested and unchallenged assertions of the defendants that the class member owes them money. The process for offsets which will follow from the Court of Appeal's order will be indistinguishable from the undertaking procedure which was stricken as unconstitutional in *Beaudreau v. Superior Court*, (1975) 14 Cal.3d 448.

Plaintiffs contend that a result which would authorize a landlord to deduct these occupancy claims from the tenants' property hardly comports with the concept of due process as understood in 1066, 1789, 1849 or 1993.

Authorizing offsets under C.C.P. § 431.70 in this case also has an equal protection aspect as it would constitute

a non-uniform, unequal application of the law regarding occupancy claims. The reason is that tenants of landlords who take security deposits under a false guise, label or representation are put to disadvantage by a delay in time – up to twelve years in this case – in the opportunity to contest the alleged claims, as distinguished from the two week period following termination of their tenancy as is provided for tenants of law abiding landlords under C.C.P. § 1950.5.

* * *

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

Filed
March 21, 1995

LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL, on behalf of themselves and all others similarly situated, Petitioners, vs. ISLAY INVESTMENTS, A California Partnership, MARVIN TREVILLIAN, Respondents.	Supreme Court No. S035591 Santa Barbara Co. Sup.Ct. No. 136 428 Court Of Appeal No. Civ B057796

PETITION FOR REHEARING AND REQUEST FOR REARGUMENT

(From The Decision Of The Court Of Appeal, Second Appellate District, Division Six, Dated September 9, 1993, As Modified October 8, 1993)

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* * *

I. CIVIL CODE SECTION 1950.5 IS UNCONSTITUTIONAL AS CONSTRUED AND APPLIED IN THE MAJORITY OPINION IN THIS CASE; TO APPLY A "GOOD FAITH" CRITERIA TO PERMIT THESE DEFENDANTS TO ASSERT THESE ALLEGED OCCUPANCY CLAIMS AS OFFSETS AGAINST PLAINTIFFS' PROPERTY (SECURITY DEPOSITS) VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION.

While the California statute governing residential security deposits is constitutional on its face, as construed and applied in this case to these defendants it violates both the due process and equal protection provisions of the U.S. Constitution. *Yick Wo v. Hopkins,* (1886) 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064.

The applicable subdivision of Civil Code Section 1950.5(f) provides that the security money taken from the tenants and kept by the landlord against possible occupancy claims was to be returned to the tenants, or they were to be furnished "an itemized written statement" (personal notice) of any claims (and the "basis for them") the landlord may have against the security money taken from the tenant within two weeks of the termination of the tenancy (timely notice of claim and opportunity to defend) for the landlord to have access to that money to satisfy his occupancy claims.

Throughout this case the landlord contended that the extra amount of money taken from the tenants for the first month as "rent" was not a security governed by Civil

Code Section 1950.5: the landlord never returned the security money to the tenants and the landlord has never furnished individual written itemization of claims or demands against the absent tenant class members for any alleged occupancy claims. As the opinion of this Court states, " . . . the Court of Appeal correctly concluded that defendants failed to comply with section 1950.5" (Slip Opinion, page 4).

To this day they have not done so, though some 14 years have passed since the tenants, by their lawsuit, first made claim for return of the security. The absent tenant class members have **never** been individually given written itemized notice of any occupancy claims by the landlord, nor the return or accounting of their security monies.[2] To this day they know not what any of the claims are and, therefore, not having personal notice of them, they have never had timely notice and opportunity to defend against them in the county of their origin throughout the 14 years of this litigation.

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[2] The Plaintiff Class encompasses persons who terminated their tenancies within 3 years of the filing of the complaint in April, 1981, or as early as April, 1978, and for all current and future tenants affected by the higher first month's rent charge. (C.T. Vol. 7, 1622-1624). The defendants discontinued the practice of taking a higher first month's rent in October, 1984. Most of those tenancies would have terminated by the end of 1985. Thus, for most class members, the tenant was entitled to the subsection (f) notice anywhere from 9 to almost 18 years ago. The statement in the "Facts" section of the majority opinion that the relevant time period for the action was April 27, 1978, to April 27, 1981, should be corrected to comply with the pleadings and class certification order and judgment.

The decision of this Court effectively equates the actual notice containing an itemized claim with its bases (as required by the legislature) with the constructive notice afforded by the class action notice which itself is wholly unspecific with respect to the individual concerned, the itemization of the charges, the amount of the charges, or the bases for the charges. The decision of the Court permits this defendant landlord, who admittedly for fourteen years has utterly and completely failed to comply with the notice and accounting provision of Civil Code Section 1950.5, to have a substantive right[3] to access that security money in satisfaction of occupancy claims by permitting offsets under requirements of the substantive statute and the equitable procedure of Code of Civil Procedure Section 431.70, if his failure to comply with the notice and accounting procedures was in "good faith."

The majority opinion omits any discussion of the individual tenant's right to due process notice although the plaintiffs raised due process concerns in their briefing to this Court.[4] [5] In its discussion, the Court concludes (at page 12) that the constructive notice by publication of the pendency of a class action lawsuit against the landlord some years after most tenancies have terminated, which did not refer to any specific claim of the landlord, did not

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[3] Slip Opinion, page 13.

[4] The majority opinion discusses the notice issue merely as an aspect of its discussion of whether permitting the landlord to utilize the security to cover its offset claims without complying with the requirements of the statute would permit the landlord to profit from its own wrong in violation of the maxim set forth in Civil Code Section 3512.

[5] See Plaintiffs' Opening Brief in this Court, pp. 19-22.

identify any specific tenant, the amount of claim or basis for claim – is notice sufficient to deprive individual tenants of their property interest in their security deposits.

Constructive notice by publication of the pendency of a class action lawsuit against the landlord, including the contentions of the parties some 5 to 8 years after the termination of the tenancies, is not the same as personal notice to the individual tenants by an accounting through a written itemized statement of claims (and their basis) furnished directly to the tenants within two weeks of the termination of the tenancy. The class action notice is insufficient under due process principles for the trial court to deprive the tenant of their property (security deposit) by way of offset for alleged unliquidated occupancy claims arising anywhere from 10 to 17 years ago. *Mennonite Bd. v.* [*sic*] *Missions v. Adams,* (1983) 462 U.S. 791, 77 L.Ed.2d 180, 103 S.Ct. 2706. In that case the Court held that notice of a proposed tax sale by publication in a newspaper was not adequate to permit extinguishment of a mortgagee's interest in real property. The court relied upon and followed a 33 year old rule of procedural due process, stating:

> In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), this Court recognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide "**notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their**

> **objections.**" Invoking this "elementary and fundamental requirement of due process," *ibid.*, the Court held that published notice of an action to settle the accounts of a common trust fund was not sufficient to inform beneficiaries of the trust whose names and addresses were known. The Court explained that notice by publication was not reasonably calculated to provide actual notice of the pending proceeding and was therefore inadequate to inform those who could be notified by more effective means such as personal service or mailed notice.

Mennonite Bd. Of Missions v. Adams, (1983) 462 U.S. at 795, 77 L.Ed.2d at 185, 103 S.Ct. at 2709, (emphasis supplied). (See also, *Tulsa Collection Services v. Pope*, (1988) 485 U.S. 470, 99 L.Ed.2d 565, 108 S.Ct. 1340).

In footnote 3 of the *Mennonite* decision, the Court noted that "Constructive notice was never deemed sufficient to bind an individual in an action *in personam*" and that *Mullane* applied that *in personam* rule of due process to *in rem* actions. (And see the many cases cited by the Court in *Mennonite Bd.* on pages 796-798 which have followed and applied the due process rule of *Mullane*).

The California State Legislature and the Governor complied with the requirements of the *Mullane* rule of due process when they enacted Civil Code Section 1950.5 with its provisions for furnishing the tenant an itemized statement of claims and their bases. The provisions of subsection (f) are reasonably calculated to give the tenant actual notice of the amount and nature of the claims, and afford the tenant a reasonable opportunity to object to the claims while the tenant still resides in the place where the

claims allegedly arose, or at least has an ascertainable forwarding address.

The majority decision not only substitutes this Court's view of adequate notice to the tenant for that determined by the legislature, but further implies that these defendants' offset rights may be pursued even though it is plain that due process notice consistent with *Mullane* can **never** be provided to the absent tenants who comprise the class in this action. It is respectfully submitted that the majority decision applying what is in effect a "good faith" exception to the operation of the statute to the defendants herein violates the Due Process Clause of the 14th Amendment to the United States Constitution. The decision holds that notice by publication of the class action in this affords absent class members reasonable notice and reasonably [*sic*] opportunity to defend against the landlord's claim against the tenant's property 9 to 17 years after the termination of those tenancies.[6]

---

[6] Defendants had the opportunity to provide constitutionally adequate notice by complying with the provisions of subsection (f) at the time of each tenant's termination. They made an intentional decision not to do so. Defendants had a further opportunity to provide constitutionally adequate notice by prosecuting the cross-complaint which they filed naming each of their former tenants against whom they sought to assert occupancy claims. Defendants intentionally abandoned the prosecution of their cross-complaint without serving any tenants. The absence of any constitutionally permissible method to litigate the occupancy claims at this point in the proceedings is the result of conscious and knowing choices by the defendants. That defendants may have made such decisions in "good faith," cannot excuse compliance with an "elementary and fundamental requirement of due process" due to the individual tenant class members.

What the decision does is waive for one who has never even attempted to comply with the statute, the statutory requirements of timeliness and provision of an opportunity to defend while the tenant remains in or has ties to the place where the claim arose. As applied to the defendants herein, the decision baldly changes the statute by substituting 14 years for two weeks in timeliness of notice and substitutes non-specific constructive notice of the pendency of a class action against the landlord for the sufficiency of a written itemized statement of claims against the tenants. It implies that a general statement that claims may exist published in a newspaper will afford the individual tenant a "reasonable opportunity to defend" a $100.00 claim 14 years after the claim arose.

> "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint." [*Mullane v. Central Hanover Bank & Trust Co.* 399 U.S. at 315, 94 L.Ed.2d 865, 70 S.Ct. 652].

Mennonite Bd. Of Missions v. Adams, supra, 462 U.S. at 795, 77 L.Ed.2d at 185, 103 S.Ct. at 2710.

The idea for a "good faith" exception to the operation of the statute may be desirable, but to apply such a rule without qualification to these defendants in this case is to violate the due process rights of the innocent tenant class members.

To require the class plaintiffs to come to Santa Barbara after 14 years and defend against the landlord claims for an average of $100 because of an incorrect choice, decision, or error the landlord made years before, and persisted in, does not comport with any conception of timely notice and a reasonable opportunity to defend within the meaning of due process of law. It is submitted that under the facts of the conduct of these landlords, the Court has unconstitutionally placed the burden of the lapse of time and inaction upon those who did not cause or create the problem, who have the smallest stake in the outcome, are least able to travel to Santa Barbara to protect the $100, and least likely to have preserved evidence and records, rather than the ones who created the problem, caused the inaction, and stand to benefit the most. Moreover, as previously noted in footnote 6, these defendants had multiple opportunities to assert their claims in a manner which would satisfy the tenants' right to due process, but chose not to do so.

Furthermore, the notice of the pendency of a class action 5 to 8 years after the termination of the tenancies is constitutionally insufficient to render the defense of estoppel in the maxim set forth in Civil Code Section 3512, or generally in equity, "unavailing" in this case. (See Slip Opinion, p. 12). It is impermissible to use a constitutionally defective notice to dismiss the contention that defendants' are estopped due to their failure to give

notice coupled with their conduct consistent with having no claims against the tenants.

Nor does the fact that the landlord has the burden of persuasion on its offset claims afford the absent tenant any meaningful protection. The landlord intends to prove its offset claims from its business records showing what repairs and cleaning were performed on a given unit after a given tenant vacated that unit. If that business record evidence is held sufficient to satisfy the burden of the landlord to make the claim, then where the tenant no longer is able to offer any evidence in defense or is never located at all the landlord will win by default, even though the tenant at one time would have been able to demonstrate that the repairs were necessitated by normal wear and tear and/or the tenant thoroughly cleaned the unit before vacating.

Finally, while the Court may wish to permit relief from a default in compliance with Civil Code Section 1950.5 for a "good faith" landlord, it should not forget a "good faith" tenant and his due process right to timely notice and a reasonable opportunity to defend by **imposing a default** on those tenants who do not receive actual notice and/or are unable after 14 years to appear and defend the landlord's claims.

The Court's opinion construes the statute to permit a landlord who in "good faith" fails to comply with the terms of the statute requiring a return of security or a written itemized statement of claims against it within 2 weeks of the termination of the tenancy to nonetheless

gain access to the tenant's security in the same manner as if the landlord had complied with the statute.

Although the term "good faith" as a standard is amorphous in itself, it is announced as a standard and applied to a landlord who has never complied with the return of money or notice and accounting procedures for 14 years, thereby extending "timeliness" of notice from two weeks to 14 years. It also, by implication, holds that despite the statute's requirement that the landlord provide directly to the tenant written notice of the specifics of the occupancy claim, it is sufficient for a landlord to provide constructive service by publication of a statement of the defendant's contention of the existence of occupancy claims against some tenants without any further specificity.

If the standard of "good faith" created by the decision is so elastic that it includes the defendant-landlord under the facts of the case before the Court – that flat non-compliance for 14 years may be "good faith" – then it fails the "void-for-vagueness" rule of federal due process by being so expansive that there is no meaningful way to know what is included and what is excluded. As the High Court said in *Smith v. Goguen,* (1974) 415 U.S. 566, 577, 39 L.Ed.2d 605, 945 S.Ct. 1242, "The absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause."

Article III, Section 3 of the California Constitution adopts the Separation of Powers doctrine as part of our constitutional law. Under that doctrine, this Court is bound not to interfere with or perform the functions of

the legislative and executive branches of government. The legislature enacted Civil Code Section 1950.5 and the Governor signed it. The legislative body decided that timely and personal notice of claims – their itemization and basis – was necessary before the landlord was to be permitted to offset occupancy claims against the security money taken from the tenants at the commencement of the tenancy. For this Court to allow this defendant landlord to assert occupancy claims under the statute is not to construe and apply but to legislate, to substitute the majority's opinion of what constitutes timely notice and opportunity to defend for that of the legislature. Civil Code Section 1950.5, as construed and applied by the majority decision to extend to the facts of this case, violates the separation of powers doctrine of the California Constitution, Article III, Section 3. As the Court violates the separation of powers doctrine, so too does it violate the Guaranty Clause of Article IV, Section 4 of the United States Constitution. *Van Sickle v. Shanahan*, (1972) 212 Kan. 426, 511 P.2d 223.

To construe and apply Civil Code Section 1950.5 so as to permit a landlord who violated the conditions of the statute governing access to the security to be able, 14 years after the termination of the tenancy, to assert offsets against the tenants, both improperly benefits non-complying landlords over landlords who comply with the requirements of the statute and improperly punishes innocent tenants of the non-complying landlords over tenants of complying landlords because – as in the case of these defendants – the non-complying landlord gets the benefit and the tenants the detriment of time's erosive

impact upon evidence and proof and burdens the tenants with the untimely need to travel to defendants' county to oppose these stale alleged claims for a relatively small amount individually. Such a result not only creates a gross disparity in the operation of Civil Code Section 1950.5, but also constitutes a virtual invitation to large landlords not to comply – plausibly violate or evade, if you will – with the provisions of the statute enacted to protect the tenants. Such non-uniform and unreasonable application of the statute violates both the principles of uniform application of the law and due process.

* * *

III.

* * *

B. The Trial Court Cannot, Consistent With Due Process, Permit Defendants To Prove And Retain Offsets Against Non-Appearing Class Members Who Have Not Received Actual Notice

In Headnote I of this Petition, plaintiffs argue that the majority opinion of this Court makes the enforcement of the landlord offset claims under Civil Code Section 1950.5, as construed and applied to this case, violate due process and equal protection. Plaintiffs have submitted that the published class action notice is constitutionally insufficient, and that even if actual, personal notice were now given to the absent class members, the use of the court to take the tenant's property in satisfaction of the landlord's offset claims for the class member who will not receive such notice of the claim until 14 years after the

claim arose is neither timely notice nor does it afford the tenant who receives actual notice a reasonable opportunity to defend.

If the defendants are permitted to proceed to prove offset claims, however, they must not be permitted to take offsets against innocent absent class members who never receive actual notice and are never given any opportunity to defend. There is no conceivable method to carry out a trial and/or hearing on an offset claim if the tenant, whose money is going to be taken away if the claim is proven, has never been given notice and never afforded an opportunity to appear. *Mennonite Bd. of Missions v. Adams,* (1983) etc., at 103 S.Ct. at 2710.

With respect to this problem, the trial court needs guidance both on the constitutional due process issue and on the equitable considerations which should inform a decision whether offset claims can be asserted at all under the facts of this case. "Courts do not allow setoff "except under very special circumstances, and where the proofs are clear and the equity is very strong." *Scammon v. Kimball,* (1875) 92 U.S. 362, 367 (2 Otto) [23 L.Ed.2d 483, 485]; *Federal Deposit Ins. Corp. v. Bank of America,* (9th Cir. 1983) 701 F.2d 831, 836-837, cert. den. 464 U.S. 935 [78 L.Ed.2d 310, 104 S.Ct. 343] .

Defendants have already set forth that they relied upon the advice of Mr. Romasanta, an Islay partner and lawyer, for their belief that the additional "rent" charge was not a security.[10] In California, a lawyer's erroneous legal determination is not generally held to be "excusable

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[10] R.T. Vol. III, 726:26 - 730:6; 865:1 - 866:6.

neglect" permitting a party relief in equity from default. *Mitchell v. State Dept. Of Transp.*, (1985) 163 Cal.App.3d 1016.

The trial court should be given guidance on how to avoid violating due process with respect to non-appearing class members and in deciding whether equity will not permit the assertion of offsets in this case.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA BARBARA

LISA GRANBERRY, et al.,	)	
Plaintiffs,	)	NO. 136428
ISLAY INVESTMENTS, et al.,	)	NOTICE TO CLASS
Defendants.	)	

TO ALL PRESENT AND PAST TENANTS OF RESIDENTIAL APARTMENTS MANAGED BY ISLAY INVESTMENTS:

If you currently reside in an apartment managed by Islay Investments or if you vacated an apartment managed by Islay Investments on or after September 27, 1978, and paid a higher amount of rent for the first month (or 31 days) of the tenancy than for the second and subsequent months, so long as you paid on a monthly basis;

YOU ARE HEREBY NOTIFIED that a class action lawsuit is pending on your behalf in the Santa Barbara Superior Court.

In the lawsuit, the Plaintiffs have alleged that the Defendant, Islay Investments, has charged its tenants a nonrefundable security deposit in the form of a surcharge on the first month's rent. Plaintiffs allege that each time Defendants charged a higher amount for the first month's rent than for the second and subsequent months, Defendants violated various provisions of California Civil Code Section 1950.5.

Defendants contend that the entire amount charged and collected for the first month (or 31 days) of any tenancy at a building managed by Islay Investments was solely for the tenant's use and occupancy of the premises and therefore, constituted rent, and was not any form of "security" or other refundable fee or charge. Defendants also contend that any refund you might be entitled to recover must be reduced by the amount of any unpaid rent, costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear, and that such sum could exceed the amount of any refund or damages you might receive.

YOU ARE FURTHER NOTIFIED that this lawsuit seeks from Defendant Islay Investments an accounting of the non-refundable alleged security deposits, interest on the alleged security held or disbursement of profits made on the alleged security held, and punitive damages not to exceed the sum of $200.00 per violation of Civil Code Section 1950.5(h). In addition Plaintiffs seek a court order declaring the defendants' rent surcharge is a non-refundable security deposit which is prohibited by Civil Code Section 1950.5. Plaintiffs' attorneys estimate that reasonable attorneys fees and costs will total 25% or less of the total aggregate recovery, which fees and costs will be deducted from any recovery.

YOU ARE FURTHER NOTIFIED that you may be excluded as participant in this class action lawsuit by submitting a written request on the attached form to:

Santa Barbara Superior Court
Clerk, Department 1
1100 Anacapa Street
Santa Barbara, California 93102

If you are a member of the above described class of persons and do not submit a written request to be excluded you will represented by Plaintiffs' counsel and will be bound by any judgment in the action whether it be favorable or unfavorable. If you do not wish to be represented by Plaintiffs' counsel you may intervene in this action through counsel of your own choosing.

THIS NOTICE IS NOT TO BE UNDERSTOOD AS ANY EXPRESSION OF ANY OPINION BY THIS COURT AS TO THE MERITS OF ANY OF THE CLAIMS OR DEFENSES ASSERTED BY EITHER SIDE IN THIS LITIGATION. THIS NOTICE IS SENT FOR THE SOLE PURPOSE OF INFORMING YOU OF THE PENDENCY OF THIS LITIGATION SO THAT YOU MAY DECIDE WHAT STEPS YOU DESIRE TO TAKE IN RELATION TO THIS LITIGATION.

Plaintiffs are represented by:

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800 Garden Street
Santa Barbara, California 93101

Anyone may examine the file in this action in the office of the Clerk for the Superior Court at 1100 Anacapa Street, Santa Barbara, California.

DO NOT CALL THE COURT!

Dated: August 10, 1987

RONALD C. STEVENS
SUPERIOR COURT JUDGE

The undersigned requests to be excluded from the Plaintiff class that has been certified in this action.

Dated: _____, 1987 _____
Signature

Please Print:

Your name: _____

Your address: _____
Street

_____
City

_____
State Zip

Supreme Court, U.S.
FILED
AUG 18 1995
CLERK

No. 95-122

In The

Supreme Court of the United States

October Term, 1995

LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

ISLAY INVESTMENTS, a California Partnership, MARVIN TREVILLIAN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

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OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioners, named class representatives, have standing to assert the claims of absent class members with respect to equitable offsets where (a) class counsel has refused to represent absent class members with respect to offsets, and (b) the class representatives will be bound, regardless of the effect of the judgment on absent members.

2. Whether this case presents a controversy appropriate for adjudication by this Court where (a) the State Court has not ruled on the federal questions presented, (b) petitioners are plainly seeking an advisory opinion, (c) petitioners' remedies will be preserved (both in the State Court and in this Court) if their due process concerns are not met on remand.

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Islay Investments, a California Partnership, and Marvin Trevillian, respectfully submit this opposition to the petition for writ of certiorari.

STATUTORY PROVISIONS INVOLVED

California Civil Code Section 1950.5 (as eff. 1985) provides, in pertinent part:

> "(e) The landlord may claim of the security only such amounts as are reasonably necessary to [the purposes for which the security could be used were previously listed here]. No later than two weeks after the tenant has vacated the premises, the landlord shall furnish the tenant with an itemized written statement of the basis for, and the amount of, any security received and the disposition of such security and shall return any remaining portion of such security to the tenant. . . .
>
> "(h) The bad faith claim or retention by the landlord . . . of a security or any portion thereof in violation of this section, may subject the landlord . . . to damages not to exceed two hundred dollars ($200), in addition to any actual damages. In any action under this section, the landlord shall have the burden of proof as to the reasonableness of the amounts claimed."

California Code of Civil Procedure Section 431.70 provides:

> "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by

one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to the other party. . . . ."

SUMMARY OF ARGUMENTS

The class representatives have no standing to assert the issues presented by the Petition because their counsel has refused to represent absent class members with respect to offsets. The class representatives will be bound regardless of the effect of the judgment on absent class members. *Zablocki v. Redhail* (1978) 434 U.S. 374.

This case does not present a controversy appropriate for adjudication by this Court because **the State Court did not authorize the trial court to adjudicate the offsets without notice to the absent class members.** The State Court remanded the case to the trial court for the adjudication of offsets, and properly directed the trial court to fashion a remedy which will avoid the practical problems about which petitioners complain. In shaping that remedy, the trial court will follow the guidance of federal courts in class action cases. **Further notice is essential** – particularly because petitioners' counsel has refused to represent the absent class members with respect to offsets.

"Actual notice" is not required. The "elementary and fundamental requirement of due process" is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 [94 L.Ed. 865; 70 S.Ct. 652]. In class actions, publication and mailing to all class members whose addresses can be ascertained is the "best notice practicable." *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156 [40 L.Ed.2d 732 at pp. 746-747; 94 S.Ct. 2140], citing *Mullane v. Central Hanover Bank & Trust Co., supra*, 339 U.S. 306, 314.

The State Court did not hold that the class action notice was a "substitute" for the "itemized statement" required by Civil Code section 1950.5. The State Court expressly held that because respondents did not comply with section 1950.5, respondents could not take advantage of the summary "deduct and retain" procedures of that statute. However, the State Court held that the loss of the right to utilize the summary proceeding did not mean that respondents lost all right to claim damages for unpaid rent, repair and cleaning, through setoff or otherwise (Code of Civ. Proc. sec. 431.70) (App. 8).

If petitioners' due process concerns are not met on remand, their right to present the federal constitutional questions which they set forth in the Petition will be preserved, both in the State Court and in this Court. Therefore, there is no reason to grant the writ.

STATEMENT OF THE CASE

This action was filed in April of 1981, when the class sued respondents for the return of sums paid as rent in the course of a rent discount program. When the program was in effect, respondents did not provide the itemized statement when the tenants vacated (sec. 1950.5) because respondents did not believe they held any "security." Instead, respondents treated the money as rent for all purposes and bore all costs of cleaning and repair. The class representatives and other tenants confirmed at trial that they did not expect to receive any money when they moved because they did not believe they had paid a security.[1]

Despite these facts, class counsel claimed that a portion of the first months' rent constituted "security" within the meaning of Civil Code section 1950.5. The complaint (and three subsequent amendments thereto) acknowledged that if the money at issue were found to be security, respondents would be entitled to claim offsets (see, e.g., JA, v. 1, 1, 20). Offsets were also pleaded as an affirmative defense in respondents' answer (JA 1484).

In 1982, the trial court granted respondents summary judgment, holding that the "first month's rental charged by [respondents] was 'rent' in fact as well as in name." In *Granberry v. Islay Investments* (1984) 161 Cal.App.3d 712, the appellate court reversed, noting the "unintelligibility"

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[1] Each of the named plaintiffs confirmed that they had no complaints about the rent discount program until they were solicited by counsel to become involved in this case.

of section 1950.5,[2] but avoiding a finding of overbreadth by holding that the character of the funds (i.e., rent vs. security) was a question of fact (*Granberry v. Islay Investments, supra,* 161 Cal.App.3d at p. 392).[3]

On remand, the trial court permitted respondents to amend their answer and file a cross-complaint to assert offsets. During those proceedings, plaintiffs' counsel admitted:

> "This Court can determine the viability of such set off claims in the context of the class action, and, should the court find that some of those setoff claims can be asserted and are viable, devise an appropriate method to resolve the individual fact issues relevant to a determination of the amount, if any, owed by Islay to each individual absent class member." (JA v. 10, pp. 2397-2398.)

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[2] Section 1950.5 defines "security" as: "(b) . . . **any payment**, fee, deposit or charge, including, but not limited to, an advance payment of rent, **used or to be used for any purpose**, including, but not limited to, any of the following: (1) The compensation of a landlord for a tenant's default in the payment of rent. (2) The repair of damages to the premises caused by the tenant or by a guest of licensee of the tenant. (3) The cleaning of the premises upon termination of the tenancy" (emphasis added).

[3] In light of this Opinion, it would have been futile for respondents to appeal the jury's finding that the money in question was "security." At least two California appellate courts have upheld section 1950.5, pleading in the process for legislative clarification. *Granberry v. Islay Investments, supra,* 161 Cal.App.3d 382, at p. 388 and *People ex rel. Smith v. Parkmerced Co.* (1988) 198 Cal.App.3d 683, 694 (King, J., concurring).

In December of 1987, petitioners' counsel mailed the class notice to each class member for whom they had an address. The notice was also published in the Santa Barbara News Press, a newspaper of general circulation. The notice advised absent class members:

> " . . . that any refund you might be entitled to recover must be reduced by the amount of any unpaid rent, costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear, and that such sum could exceed the amount of any refund or damages you might receive. . . .
>
> . . .
>
> "If you are a member of the above described class of persons and do not submit a written request to be excluded you will be represented by [petitioners'] counsel and will be bound by any judgment in the action whether it be favorable or unfavorable."

However, as the litigation progressed, petitioners' counsel claimed that while they **did** represent absent class members with respect to claims against respondents, counsel **did not** represent absent class members with respect to the offsets (JA, v. 10, 2317).[4] Because counsel refused to represent absent class members with respect to

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[4] When respondents served petitioners' counsel with Doe amendments to the cross-complaint already on file against the named class members (each of which asserted the specific claims for each absent class member's failure to pay rent and for cleaning and damage repair (JA, v. 9, 2286)), petitioners' counsel quashed service on the ground that they did not represent the absent class members with respect to respondents' claims for offset (JA, v. 10, 2317).

the offsets, petitioners have no standing in this Court (see Arg. I, *infra*).

During pre-trial proceedings, the parties conducted extensive discovery about the offsets. At one point, the appellate court intervened and required respondents to provide the factual basis for each offset (2d Civ. Nos. B036953 and B036956). Respondents did so, at great cost (JA, v. 13, 3331). The itemizations of offsets and the supporting documents were made available to petitioners by way of an extensive document production (Exhs. 278-280).

When petitioners realized that respondents' offsets were *bona fide*, they sought relief from their earlier admission that respondents were entitled to claim them. They also moved for summary adjudication, claiming that respondents' offsets were barred for failure to provide accountings of the disposition of the security within two weeks after the tenants vacated (sec. 1950.5, subd. (f)). The trial court granted petitioners' motion and struck respondents' affirmative defense of offset.

The matter proceeded to trial. The jury was provided a copy of the entire text of section 1950.5, but was not informed that the trial court had forfeited respondents' offsets. Despite uncontroverted evidence that the rent discount program was a sound and successful marketing program (designed to lengthen the term of tenancies), and despite any lack of correlation between the industry average security deposit and the amount of the rent discount, and despite the class representatives' testimony (and that of other tenants) that they were not misled in

any way, the jury found the sum in question to be "security" within the meaning of section 1950.5.[5]

Shortly after the jury's verdict, respondents completed the itemized statements with respect to both the rent discount and the offsets for each tenancy (RT, v. VI, 1604-1605) and the case proceeded through an accounting phase. The accounting itself consists of a 1339-page computer printout listing the rent discount for each class member and each statutory offset (Exhs. 278-280). Other than a discrepancy as to the number of tenancies, petitioners' counsel stated they had no objection to the information which had been provided by respondents, and respondents' accounting was received into evidence.

The trial court entered judgment, and both parties appealed. In *Granberry v. Islay Investments* (2d Civ. No. B057796), the appellate court reversed the forfeiture of respondents' right to offset.[6] The California Supreme

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[5] The jury deliberated the issue of "rent" v. "security" for four days; the vote was 9 to 3 in petitioners' favor. The same jury decided in 2 hours that respondents had not acted in "bad faith."

[6] Petitioners' statements concerning automatic escheat of the unclaimed security (Pet., p. 15, fn. 7) and referring to the Controller as the "successor in interest" to the absent class members (Pet., p. 23) are incorrect. Reversion of the unclaimed class residue is an appropriate remedy in a proper case. *Van Gemert v. Boeing* (2d Cir. 1984) 739 F.2d 730; *Wilson v. Southwest Airlines, Inc.* (5th Cir. 1989) 880 F.2d 807. The appellate court affirmed that part of the judgment by which the trial court found that respondents were entitled to retain the unclaimed residue. The California Supreme Court did not hold that the residue would automatically escheat. Instead, the Court simply directed the trial court to reconsider that issue after it had litigated the question of offsets (App. 19).

Court granted review, and the majority affirmed respondents' right to claim equitable offsets, subject to equitable defenses (App. 16).

Petitioners' characterization of the State Court's Opinion is seriously flawed. **The State Court did not authorize the trial court to adjudicate** respondents' offsets without further notice to absent class members. That issue was not before the Court. Instead, petitioners argued that respondents should not be allowed **to claim** offsets because (a) the class notice was not sufficient to apprise absent class members that offsets were at issue, and (b) respondents had originally claimed that the money was rent (App. 14). That is the context in which the State Court rejected petitioners' arguments regarding estoppel and lack of notice (cf. Pet., p. 11).

More importantly, in response to petitioners' assertion that respondents should not be entitled **to claim** offsets because of the practical difficulties inherent in the process, the Court held that respondents' rights should not be sacrificed simply because petitioners chose to proceed by way of class action:

> "First, **it may well be possible on remand to shape a remedy that will avoid many of the problems [petitioners] have identified.** Second, it is inappropriate to deprive [respondents] of their substantive rights merely because those rights are inconvenient in light of the litigation posture [petitioners] have chosen. (see *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462, fn. omitted ['Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with

the ends – to sacrifice the goal for the going.'].)" (App. 15-16.)

This holding is not reasonably susceptible to the interpretation seized on by petitioners in their attempt to create an issue for this Court's review. The State Court simply confirmed respondents' **right to claim** offsets; the Court did not purport to direct the manner in which those offsets would be **adjudicated**.[7] There is well settled authority to guide the trial court in shaping a procedure by which to adjudicate offsets (including further notice to the class). Unless and until that procedure infringes upon the due process rights of absent class members, this case will not present a controversy appropriate for adjudication by this Court.

REASONS TO DENY THE WRIT

I

THE NAMED CLASS REPRESENTATIVES HAVE NO STANDING.

Federal standing "requires an allegation of a present or immediate injury in fact, where the party requesting standing has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.' " *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 805 [86 L.Ed.2d 628; 105 S.Ct. 2965]. That situation is not present

[7] Except to require an evidentiary hearing at which, among other things, petitioners will be entitled to assert equitable defenses (App. 16).

in this case because petitioners' counsel claimed throughout the state court proceedings that he **did not** represent the absent class members with respect to offsets.[8]

Moreover, the named class members, against each of whom respondents claim offsets, will be bound regardless of the effect of the judgment on absent class members. *Zablocki v. Redhail* (1978) 434 U.S. 374. Under those circumstances, "the absent class members must be content to assert their due process rights for themselves, through collateral attack or otherwise." *Id.*, 434 U.S. at p. 380, fn. 6.

II

PETITIONERS ARE SEEKING AN ADVISORY OPINION. THE CALIFORNIA COURTS WILL NOT ADJUDICATE RESPONDENTS' OFFSETS WITHOUT PROVIDING FURTHER NOTICE TO THE CLASS. THEREFORE, THE QUESTION OF WHETHER SUCH NOTICE (AND THE PROCEEDINGS AFTER REMAND) SATISFIES DUE PROCESS DOES NOT PRESENT A CONTROVERSY APPROPRIATE FOR ADJUDICATION BY THIS COURT.

The State Court determined only respondents' **right to claim** offsets. **The State Court did not direct the trial court to "adjudicate" offsets without further notice to the absent class members.** Therefore, the first issue framed by petitioners is not properly before this Court.

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[8] Cf. Pet., p. 17, where counsel now claims that he **does** represent the absent class members.

The State Court remanded the case to the trial court with directions to adjudicate the offsets and properly delegated to the trial court the duty to "shape a remedy" to avoid the practical problems identified by petitioners. In shaping that remedy, the trial court will follow federal class action guidelines with respect to notice to absent class members.[9] Petitioners are not entitled to review based on their speculation that the trial court will not follow federal guidelines. In fact, further notice to the absent class members (i.e., the "best notice practicable") is essential in this case **because, contrary to the original notice, petitioners' counsel has now refused to represent them with respect to offsets.**

Under these circumstances, it is plain that this case is not ripe for review because the federal courts "do not render advisory opinions. For adjudication of constitutional issues, concrete legal issues, presented in actual bases, not abstractions, are requisite." *United Public Workers v. Mitchell* (1947) 330 U.S. 75, 89 [67 S.Ct. 556]; *Communist Party of U.S. v. Sub. Act. Cont. Bd.* (1961) 367 U.S. 1, 71 [81 S.Ct. 1357].

> "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function

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[9] California courts look to federal case law for guidance in class actions (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 709), particularly where due process issues are presented (*Carabini v. Superior Court* (1994) 26 Cal.App.4th 239, 242-244).

> [and does not present] a controversy appropriate for adjudication."
>
> *International Longshoremen's and Warehousemen's Union v. Boyd* (1954) 347 U.S. 222, 223-224 [74 S.Ct. 447].[10]

For the same reason, petitioners' request that this Court remand to the State Court with directions to rule on the issue of future notice to the class is also inappropriate because such a remand would require the State Court to render an impermissible "advisory" opinion (see, e.g., *Younger v. Superior Court* (1978) 21 Cal.3d 102, 119-120; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170; Cal. Const., Art. VI, sec. 11).

III

"ACTUAL NOTICE" IS NOT REQUIRED IN ANY EVENT.

Petitioners anticipated the "ripeness" objection by asserting that, even if further notice is given to the class,

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[10] Petitioners' reliance on *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 [95 S.Ct. 1029; 43 L.Ed.2d 328] is misplaced. In *Cox*, the state court had actually decided the federal question. Moreover, the categories delineated in *Cox*, where review is appropriate even though the case has been remanded for further proceeedings, involve situations where "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date" (*Id.*, 420 U.S. at p. 478). In this case, the federal question will not arise until remand and, even then, petitioners' due process concerns may be satisfied.

offsets should be denied because "actual notice" cannot be given (Pet., p. 16).[11] **"Actual notice" is not required.**

The original class notice, which the State Court found sufficient to apprise absent class members that offsets were at issue, was mailed to each class member whose address was ascertainable. The notice was also published in a newspaper of general circulation. Similar notice will be given after remand; this further notice will also be sufficient under this Court's guidelines for class actions.

Contrary to petitioners' contentions, this Court has never required "actual notice" prior to deprivation of property through state auspices (Pet., p. 17). The "elementary and fundamental requirement of due process" is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U.S. 306, 314. In class actions, publication and mailing to all class members whose addresses can be

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[11] There is no evidence to support petitioners' claim that "it is no longer possible to give due process notice to any, or at the least, the vast majority of class members at this late date" (Pet., p. 23). In fact, petitioners have misstated the percentages. On page 7, petitioners acknowledge that of the 5,438 notices mailed, only 1756 were returned. That means that **68% of the notices were actually received by class members** (cf. Pet., p. 16, fn. 8, where petitioners state that the notices reached only a third of the absent class members). Moreover, petitioners have entirely omitted from their calculations those class members who received notice through publication.

ascertained is the "best notice practicable." *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. 156, citing *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U.S. 306, 314; see, also, *Oppenheimer Fund, Inc. v. Sanders* (1978) 437 U.S. 340, 348 [57 L.Ed.2d 253; 98 S.Ct. 2380]; *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812-813 [86 L.Ed.2d 628; 105 S.Ct. 2965].

None of the cases cited by petitioners would require "actual notice" to absent class members in this case. In *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U.S. 306, 317-318, this Court specifically held that published notice was constitutionally sufficient for beneficiaries whose interests or whose whereabouts could not be ascertained. In *Mennonite Bd. v. Missions v. Adams* (1983) 462 U.S. 791 [77 L.Ed.2d 180; 103 S.Ct. 2706] and *Tulsa Collection Services v. Pope* (1988) 485 U.S. 470, 490 [99 L.Ed.2d 565; 108 S.Ct. 1340], this Court held published notice insufficient only because the names and addresses of parties were known or reasonably capable of ascertainment.

Petitioners' speculative complaints (Pet., pp. 19-20) are entirely unwarranted. Respondents' rights cannot be forfeited simply because petitioners chose the class action vehicle in which to litigate their complaints and unnecessarily prolonged the proceedings by unremitting appeals.[12] After remand, the absent class members will be

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[12] As the State Court noted, delay prejudices the landlord, who loses the opportunity to take advantage of the summary deduct and retain procedure, and must "instead prove in court by a preponderance of the evidence that he is entitled to damages and that the amount claimed is reasonable. (Sec. 1950.5,

given notice of the details of respondents' claims and will be given an opportunity to appear and object if they wish, consistent with the requirements of *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. 156. Whether the notice which will be provided to the class after remand offers the absent members a "reasonable" choice cannot be determined because the notice has not yet been formulated in the trial court.

IV

THE STATE COURT DID NOT HOLD THAT THE CLASS NOTICE SUBSTITUTED FOR THE STATUTORY REQUIREMENT OF A TIMELY "ITEMIZED STATEMENT" (CIV. CODE SEC. 1950.5). THE STATE COURT HELD THAT RESPONDENTS' GOOD FAITH FAILURE TO COMPLY WITH CIVIL CODE SECTION 1950.5 DID NOT BAR RESPONDENTS' CLAIM TO EQUITABLE OFFSETS (CODE OF CIV. PROC. SEC. 431.70).

Petitioners' assertion that the state court "substituted" the class notice for the "notice" required by section 1950.5 (Pet., 14-15 and fn. 6) is faulty in several critical respects. First, Civil Code section 1950.5 does not require "notice" – the statute simply requires an "itemized statement" of the security and its disposition (sec. 1950.5, subd. (e)). The Legislature did not require

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subd. (k).) This burden of proof will become ever more difficult to sustain the longer the landlord delays, because the evidence supporting his claim may be lost with the passage of time." (App. 14.)

due process notice with respect to the itemized statement. Instead, the Legislature anticipated that litigation may be necessary to enforce the parties' rights – litigation in which the due process rights of all parties would be protected.[13]

More importantly, **the State Court did not hold that the class notice "substituted" for the itemized statement required by section 1950.5** (Cf. Pet., pp. 14-15 and fn. 6). To the contrary, the State Court expressly found that respondents **had not complied** with section 1950.5 and thus could not avail themselves of the "deduct and retain" procedure set forth in section 1950.5 (App. 5-10).

The heart of the State Court's opinion, which petitioners have entirely ignored, is the Court's conclusion that equitable offsets should not be automatically denied every landlord who does not comply with the statutory provisions (sec. 1950.5). To reach that result, the State Court utilized principles well settled in this Court.

First, as this Court has held, "forfeiture remedies and penalties are the subject of historic disfavor in our country." *Alexander v. United States* (1993) 509 U.S. ___ [125 L.Ed.2d 411, 458]. Therefore, the State Court construed section 1950.5 to avoid forfeiture, analyzing whether the allowance of equitable offsets would be consistent with the legislative intent underlying section 1950.5 (App., pp. 7-10). The State Court found equitable offsets consistent

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[13] And, to even the playing field, the Legislature expressly provided that, in the event of such litigation, the landlord bears the burden of proof as to the reasonableness of the offsets (sec. 1950.5, subd. (h) now (k)).

with the legislative intent because (a) there was no indication that the Legislature intended forfeiture for failure to timely provide the itemized statement, and (b) forfeiture of offsets would imply a penalty not provided by the Legislature – a penalty which would punish landlords who acted in good faith (App., p. 12).[14]

Respondents' good faith misinterpretation of the statute was graphically demonstrated by the aggregate losses respondents incurred during the rent discount program. The amount of the jury-found security is approximately $1,000,000. The accounting (accepted by the trial court) sets forth statutory offsets of approximately $1,600,000.

Second, the State Court acknowledged that the equitable right of setoff derived from the English Chancery Courts (App. 6-7). As this Court has held, the "substantive principles of Courts of Chancery remain unaffected." *Stainback v. Mo Hock Ke Lok Po* (1949) 336 U.S. 368, 382, fn. 26 [69 S.Ct. 606]; see, also, *BFP v. Resolution Trust Corp.* (1994) 511 U.S. ___ [128 L.Ed.2d 556, 566-567].

> "Whether the suit be one at law or in equity, setoff must be understood as that right which exists between two parties, each of whom, under an independent contract, owes an ascertained amount to the other, to set off their respective debts by way of mutual deduction, so that, in any action brought for the larger debt,

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[14] The State Court also refused to imply a penalty for noncompliance, because the statute contains a penalty (i.e., for "bad faith") (App. 12). Thus, the question of good faith arose during the Court's interpretation of the statute and not during the Court's consideration of due process, as petitioners suggest (cf. Pet., p. 25, fn. 9).

> the residue only, after such deduction, shall be recovered [citation]."
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> *Scammon v. Kimball* (1875) 92 U.S. 362, 367 [23 L.Ed. 483, 485].

This equitable right of setoff is protected by California Code of Civil Procedure section 431.70, a rule of procedure which permits a defendant to offset any sum due from plaintiff without the necessity of bringing an independent action and without regard to the statute of limitations (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 362; *Hauger v. Gates* (1954) 42 Cal.2d 752, 755).

> "[T]he underlying purpose of [section 431.70] is to prevent a party from sitting on a claim against a particular person and thereby inducing that person to permit his or her counterclaim to become time barred. . . . "
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> *Carnation Co. v. Olivet Egg Ranch* (1986) 189 Cal.App.3d 809, 821.

When the Legislature enacted section 1950.5, it codified the reciprocal rights and duties of landlords and tenants. When a landlord provides a tenant the use and enjoyment of his property, the tenant must pay rent and must bear the cost of cleaning and damage caused by the tenant to the leased premises. There is no reason (in law or in equity) why any class member (named or unnamed) should be entitled to step into line for a refund of "security" without offsetting the amount he or she owes respondents for cleaning, repairs, or unpaid rent.[15]

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[15] Petitioners' claim that it would be "unreasonable to make most tenants defend a claim for a few hundred dollars"

Third, the State Court acknowledged the need for flexibility in ruling on issues of setoff (App. 13-14). See, e.g., *Baker v. Gold Seal Liquors, Inc.* (1974) 417 U.S. 467, 475-476 (Stewart, J., dissenting) [94 S.Ct. 2504; 41 L.Ed.2d 243]. The State Court refused petitioners' suggestion that it adopt "hard and fast" rules, and instead remanded the case to the trial court for consideration of the offsets and any equitable defenses thereto.[16]

Fourth, the State Court held that offsets could not be denied simply because of the "practical problems" which might arise in the context of a class action. As this Court has held, a class action right is a "procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank v. Roper* (1980) 445 U.S. 326, 333

(Pet., p. 26) ignores this basic reciprocity. It also "confuse[s] the means with the ends [and sacrifices] the goal for the going." *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462. Ms. Granberry's rent discount was $100.00; she stipulated to a judgment against her in the sum of $136.00 (JA, v. 4, 1029-1030). The Glasspools' rent discount was $100.00; it cost respondents $243.00 to clean and repair their apartment (Exh. 279). Cosettie Jordan's rent discount was $100.00; she left owing $88.33 in back rent and it cost $161.66 to clean and repair after her (Exh. 278). More than 250 class members moved from respondents' apartments with rents, cleaning costs and damages in excess of $1,000 (Exhs. 278-279).

[16] Having chosen a procedural vehicle for their lawsuit (i.e., the class action) which is grounded in equity and in which the trial court is vested with the broadest discretion (*Richmond v. Dart* (1971) 29 Cal.3d 462, 470, 473-474; *Green v. Obledo* (1981) 29 Cal.3d 126, 148; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821), petitioners should not complain that the issues will be resolved within that equitable, discretionary framework.

[100 S.Ct. 1166; 63 L.Ed.2d 427]. Substantive rights are not forfeited simply because it is not convenient to resolve them.[17]

That is particularly true where the preservation of respondents' substantive right to offsets **accomplishes precisely what the class notice informed the class** – i.e., their "security" would be returned, less statutory claims for unpaid rent, cleaning and repair.

Federal courts permit defensive setoffs in class actions (*Herrmann v. Atlantic Richfield Co.* (1976) 72 F.R.D. 182, 185-186) as well as counterclaims, whether filed at the inception of the case or against absent class members when they come forward to claim their damages (see, e.g., *In re Financial Partners Class Action Litigation* (N.D. Ill. 1984) 597 F.Supp. 686, 688-689; *In re Sugar Industry Antitrust Litigation* (1976) 73 F.R.D. 322, 349 (approving the inclusion of a "brief description of each potential counterclaim" in the original class action notice (*Id.*, at p. 349)); *Weit v. Continental Illinois National Bank and Trust Company of Chicago* (1973) 60 F.R.D. 5, 8).

Therefore, once again, petitioners' specific complaints are unavailing (Pet., pp. 25-27). The State Court did not eliminate any requirement for "notice." Even

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[17] Accordingly, the fact that the amount of damages is invariably an individual question does not defeat class action treatment. *Blackie v. Barrack* (9th Cir. 1975) 524 F.2d 891, 905 (cert. den., 429 U.S. 816 [50 L.Ed.2d 75; 97 S.Ct. 57]); *Bing v. Roadway Express, Inc.* (5th Cir. 1973) 485 F.2d 441, 448. Thus, federal courts often utilize the procedure of split trials or a master determines individual damages during the claims process (see, e.g., *Green v. Wolf Corporation* (1968) 406 F.2d 291, 301).

though respondents are not entitled to utilize the "deduct and retain" provisions of section 1950.5, this remains a class action and absent class members will be given notice of any further proceedings in which their individual rights may be determined. Petitioners' claim that it is "unreasonable" to require the class members to defend against equitable offsets (Pet., p. 26), which both this Court and the State Court have recognized as substantive rights which derive from the English Chancery Courts, is the height of sophistry.

V

THERE HAS BEEN NO VIOLATION OF THE SEPARATION OF POWERS DOCTRINE.

The separation of powers doctrine (embodied in Art. IV, sec. 4 of the United States Constitution and in Art. III, sec. 3 of the California Constitution), "assigns the resolution of . . . specific controversies to the judicial branch of government." *Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1212. One such fundamental assignment to the judiciary involves the interpretation of statutes which the legislature has enacted. *Davis v. Passman* (1979) 442 U.S. 228, 236, fn. 11 [99 S.Ct. 2264; 60 L.Ed.2d 846]; *Lentz v. McMahon* (1989) 49 Cal.3d 393, 402-406.

This case involves the interpretation by the State Court of Civil Code section 1950.5 and the analysis of the interplay between section 1950.5, the equitable right of setoff, and Code of Civil Procedure section 431.70. The separation of powers doctrine is not implicated by that judicial function.

CONCLUSION

If petitioners are dissatisfied with the proceedings in the trial court after remand, and if petitioners have any ground upon which to claim a violation of their federal rights, then they may seek additional review. However, their request for review at this point in the proceedings is an improper plea for an advisory opinion.

For these and for all the reasons set forth herein, the writ should be denied.

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